Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

(18)

No. 05-1345

In the Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., AND INGERSOLL PICKUP INC.,

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA, AND COUNTY OF HERKIMER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED APRIL 21, 2006
CERTIORARI GRANTED SEPTEMBER 26, 2006

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U.S. DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK (Syracuse)
Case No. 5:95-cv-00516-NAM-DEP

United Haulers Ass'n., Inc., et al.,
Plaintiffs,
v.
Oneida-Herkimer Solid Waste Management Authority, et al.,
Defendants.

RELEVANT DOCKET ENTRIES

Date Filed	No.	Docket Text
04/14/1995	1	COMPLAINT filed.
06/15/1995	6	ANSWER to Complaint by County of Oneida.
06/15/1995	8	ANSWER to Complaint by Oneida-Herkimer.
06/16/1995	9	ANSWER to Complaint by County of Herkimer.
07/27/1995	14	MOTION by United Haulers Assn., Transfer Systems Inc, Bliss Enterprises, Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial, Ingersoll Pickup Inc for Summary Judgment, Hearing set for 10:00 8/21/95 Motion returnable before Judge/Mag. Judge: Pooler (Statement of Undisputed Facts attached).
07/27/1995	15	AFFIDAVIT of KRISTIN CARTER ROWE, ESQ. on behalf

Date Filed	No.	Docket Text
		of United Haulers Assn., Transfer Systems Inc, Bliss Enterprises, Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial, Ingersoll Pickup Inc Re: [14-1] motion for Summary Judgment (Exhibits A-N attached).
07/27/1995	16	AFFIDAVIT of DAVID N. LEVITT on behalf of United Haulers Assn., Transfer Systems Inc, Bliss Enterprises, Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial, Ingersoll Pickup Inc Re: [14-1] motion for Summary Judgment (Exhibits A-D attached).
07/27/1995	17	AFFIDAVIT of JEFF BLISS on behalf of United Haulers Assn., Transfer Systems Inc, Bliss Enterprises, Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial, Ingersoll Pickup Inc Re: [14-1] motion for Summary Judgment (Exhibit A & B attached).
07/27/1995	18	AFFIDAVIT of MARCELLA GUERRIERO on behalf of United Haulers Assn., Transfer Systems Inc, Bliss Enterprises, Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial,

Date Filed	No.	Docket Text
		Ingersoll Pickup Inc Re: [14-1] motion for Summary Judgment (Exhibits A-B attached).
07/27/1995	19	MEMORANDUM by United Haulers Assn., Transfer Systems Inc, Bliss Enterprises, Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial, Ingersoll Pickup Inc in support of [14-1] motion for Summary Judgment (Exhibits A-D attached).
07/27/1995	22	AFFIDAVIT of PHILIP A. RAYHILL, ESQ. on behalf of Oneida-Herkimer Re: [14-1] motion for Summary Judgment (Exhibits 1-5 attached).
07/27/1995	23	AFFIDAVIT of MICHAEL A. GAPIN on behalf of Oneida-Herkimer in OPPOSITION to [14-1] motion for Summary Judgment.
07/27/1995	24	AFFIDAVIT of ROBERT F. JULIAN on behalf of Oneida-Herkimer Re: [14-1] motion for Summary Judgment (Exhibits 1-11 attached).
07/27/1995	24	Exhibits J-6, J-7 and J-8 in support of Robert Julian's [24-1] Affidavit.
07/27/1995	25	AFFIDAVIT of HANS G.

Date Filed	No.	Docket Text
		ARNOLD on behalf of Oneida-Herkimer Re: [14-1] motion for Summary Judgment (Exhibits A-1 - A-12 attached).
07/27/1995	25	Exhibits A-1, A-2, A-3, A-4, A-5, A-6, A-7, A-8, A-9, A-10 and A-11 in support of Hans Arnold's [25-1] Affidavit.
07/27/1995	25	Exhibit A-12 in support of Hans Arnold's [25-1] Affidavit.
07/27/1995	26	MEMORANDUM by Oneida-Herkimer in opposition to [14-1] motion for Summary Judgment (w/attachments).
07/27/1995	27	AFFIDAVIT of CARRIE MCLOUGHLIN NOLL on behalf of County of Herkimer in OPPOSITION to [14-1] motion for Summary Judgment (AFFIDAVIT of RONALD N. SOLTYS and Proof of Mailing attached).
07/27/1995	28	MEMORANDUM by County of Herkimer in opposition to [14-1] motion for Summary Judgment.
07/27/1995	29	MEMORANDUM by County of Oneida in opposition to [14-1] motion for Summary Judgment.
07/27/1995	30	REPLY by United Haulers Assn., Transfer Systems Inc, Bliss

Date Filed	No.	Docket Text
		Enterprises, Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial, Ingersoll Pickup Inc to response to [14-1] motion for Summary Judgment.
07/27/1995	31	AFFIDAVIT of KEVIN M. YOUNG, ESQ. on behalf of United Haulers Assn., Transfer Systems Inc, Bliss Enterprises, Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial, Ingersoll Pickup Inc Re: [14-1] motion for Summary Judgment (Exhibits A-F attached).
07/27/1995	32	AFFIDAVIT of STEVEN R. KOWALSKY on behalf of United Haulers Assn., Transfer Systems Inc, Bliss Enterprises, Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial, Ingersoll Pickup Inc Re: [14-1] motion for Summary Judgment (Exh. A attached).
07/27/1995	33	AFFIDAVIT of MARCELLA GUERRIERO on behalf of United Haulers Assn., Transfer Systems Inc, Bliss Enterprises, Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial, Ingersoll Pickup Inc Re: [14-1] motion for Summary Judgment (Exhibits A-D attached).

Date Filed	No.	Docket Text
10/16/1995	40	MEMORANDUM by County of Herkimer in further opposition to [14-1] motion for Summary Judgment.
10/17/1995	41	MEMORANDUM by Ingersoll Pickup Inc, Levitt's Commercial, Bristol Trash Removal, Ken Wittman Sanitation, Bliss Enterprises, Transfer Systems Inc, United Haulers Assn. in FURTHER support of [14-1] motion for Summary Judgment.
10/17/1995	44	Supplemental MEMORANDUM of Law by County of Oneida, Oneida-Herkimer in opposition to [14-1] motion for Summary Judgment.
10/23/1995	46	MEMORANDUM of Law by County of Herkimer, County of Oneida, Oneida-Herkimer in opposition to [14-1] motion for Summary Judgment.
10/24/1995	45	REPLY BRIEF IN RESPONSE TO DEFENDANTS' SUPPLEMENTAL MEMORANDA OF LAW by Ingersoll Pickup Inc, Levitt's Commercial, Bristol Trash Removal, Ken Wittman Sanitation, Bliss Enterprises, Transfer Systems Inc, United Haulers Assn. RE: [14-1] motion

Date Filed	No.	Docket Text
		for Summary Judgment.
05/24/1996	71	MINUTE ENTRY of TELEPHONE CONFERENCE w/Judge Pooler: APP: Philip Rayhill, Esq. for Oneida-Herkimer, James O'Shea, Esq. for County of Oneida, Carrie Noll, Esq. for County of Herkimer, Kevin Young, Esq. and Kristin Carter Rowe, Esq. for pltfs. Pltf. makes motion for TRO to prohibit Authority or County from enforcing flow control pending the court's decision on pending motion. Judge does not issue TRO as no irreparable harm can be shown; damages can be measured in dollars.
03/31/2000	83	ORDERED, that the pltf's [14-1] motion for Summary Judgmentis granted on their first cause of action and defts are enjoined from enforcing flow control laws; the United Haulers lacks standing only with respect to the claim under Section 1983, but I grant the remaining pltf's summary judgment on that second cause of action; the matter is referred to Mag. Judge DiBianco for calculation of damages. (signed by Judge Rosemary S. Pooler). Modified on 06/28/2000.

Date Filed	No.	Docket Text
03/31/2000		CASE REFERRED to Magistrate Judge Gustave J. DiBianco for calculations of damages pursuant to [83-1] Order.
04/03/2000		CASE reassigned to Judge Norman A. Mordue.
04/28/2000	85	NOTICE OF APPEAL by Oneida-Herkimer.
04/28/2000	86	NOTICE OF APPEAL by County of Oneida.
04/28/2000	87	NOTICE OF APPEAL by County of Herkimer.
05/08/2000		Notice of appeal and certified copy of docket to USCA re: [87-1] appeal by County of Herkimer, [86-1] appeal by County of Oneida, [85-1] appeal by Oneida-Herkimer.
06/16/2000	89	COURT NOTICE of Reassignment of Action to Hon. David E. Peebles. US Magistrate Judge w/copy Order.
06/16/2000		CASE NO LONGER REFERRED TO Magistrate Judge Gustave J. DiBianco.
06/16/2000		CASE REFERRED to Magistrate Judge David E. Peebles.
07/11/2000		USCA Case Number Re: [87-1]

Date Filed	No.	Docket Text
		appeal by County of Herkimer, [86-1] appeal by County of Oneida, [85-1] appeal by Oneida-Herkimer; USCA #: 00-7593(L), 00-7595 (con) & 00-7597 (con).
12/05/2000	95	Minute entry: Tel. Conf. w/MJ Peebles - MJ Peebles to sign Stipulation & Order substituting Atty. Cahill for Atty. Rayhill; attys. agree that damages phase should be stayed until 2nd Circuit decision on appeal; MJ Peebles to issue order staying case; attys. to notify Court when decision received & further conf. to be scheduled.
12/07/2000	96	LETTER STIPULATION and ORDER dd 12/1/00 by Kevin M. Young, Esq. for pltf and Michael J. Cahill, Esq for defts requesting to Stay discovery pending a decision by the Court of Appeals ; Granted. Upon a decision of the Court of Appeals, the parties shall promptly notify the Mag. Judge of such decision and schedule a further conference of the matter to address remaining issues of discovery, if any. (signed by Magistrate Judge David E. Peebles).
08/24/2001	101	MANDATE OF USCA (certified

Date Filed	No.	Docket Text
		copy dated 8/21/01) Re: [87-1] appeal by County of Herkimer, [86-1] appeal by County of Oneida, [85-1] appeal by Oneida-Herkimer - the judgment of said district court be and it hereby is REVERSED and REMANDED for further proceedings in accordance with the opinion of this Court. The parties shall bear their own costs.
10/02/2001	102	Minute entry of telephone conference held w/MJ Peebles: pltf will be filing a petition for certiorari; matter will be stayed pending petition.
09/24/2002	123	Minute entry of in-person pretrial conference; App: Kevin Murphy, Esq. for UHA, Michael Cahill, Judy Drabicki, Esqs. for defts., Richard Frye, Esq. for Oneida County, Chris Sing, Esq. for Herkimer Co., Clerk C. McNulty; Parties requested bifurcation of liability from damages and for purposes of discovery and MJ Peebles agreed, subject to approval by Judge Mordue; The Parties believe that the liability issue can be decided on the papers although damages might require a non-jury trial; The subject of experts were discussed and an

Date Filed	No.	Docket Text
		agreed upon discovery schedule and expert reports were developed; The parties report that at the present time there is no likelihood of settlement ; set Tel. Conf. for 3:00 1/15/03 (pltf to initiate).
09/27/2002	125	ORDER SUPPLEMENTING THE UNIFORM PRETRIAL ORDER: The UPSO is hereby modified to provide that the Discovery and motion phases of the case shall be bifurcated, with the issue of liability being determined first, followed by a determination through motion, trial or otherwise, of the damages phase if required; The Deadline for completion of Discovery with regard to the liability phase of the case is hereby extended until 2/14/03 inclusive; Plaintiffs expert disclosure is due 11/1/02, defendants expert disclosure due 12/16/02 and Rebuttal Expert Disclosure is due 1/10/03; the deadline for filing dispositive motions remains 4/30/03; All other provisions of the USPO shall remain the same; the procedures and deadlines associated w/the damages phase shall be determined by the Court at a future date, depending on the

Date Filed	No.	Docket Text
		outcome of liability; So Ordered signed by Magistrate Judge David E. Peebles 9/27/02.
04/11/2003	145	MOTION by Kevin C. Murphy, Esq., on behalf of the plaintiffs' for Partial Summary Judgment on the issue of Liability.
04/11/2003	152	MOTION by Michael J. Cahill, Esq., on behalf of the defendants' for Summary Judgment dismissing the complaint and for Attorneys Fees & Costs.
05/02/2003	160	CROSS MOTION by Kevin C. Murphy, Esq., on behalf of the plaintiffs' for Partial Summary Judgment on the issue of Liability.
05/16/2003	146	Statement of Material Facts in Support of [145-1] Motion for Partial Summary Judgment on the issue of Liability filed by plaintiffs.
05/16/2003	147	AFFIDAVIT: by Kevin C. Murphy, Esq., on behalf of the plaintiffs in support of [145-1] Motion for Partial Summary Judgment on the issue of Liability, w/attached exhibits 1 through 24.
05/16/2003	148	PLAINTIFFS' EXHIBITS - VOLUME II, attaching exhibits 25 through 52 in support of [147]

Date Filed	No.	Docket Text
		Affidavit of Kevin C. Murphy, Esq., and [145] Motion for Partial Summary Judgment.
05/16/2003	149	MEMORANDUM OF LAW: by Kevin C. Murphy, Esq., on behalf of plaintiffs' in support of [145-1] Motion for Partial Summary Judgment on the issue of Liability, w/attachment.
05/16/2003	150	Defendants' Response Statement of Material Facts, Re: plaintiffs' [145-1] Motion for Partial Summary Judgment on the issue of Liability.
05/16/2003	151	MEMORANDUM OF LAW: by Michael J. Cahill, Esq., on behalf of the defendants' in opposition to [145-1] Motion for Partial Summary Judgment on the issue of Liability.
05/16/2003	153	Statement of Material Facts in Support of defendants' [152-1] Motion for Summary Judgment dismissing the complaint and for Attorneys Fees & Costs.
05/16/2003	154	AFFIRMATION: by Michael J. Cahill, Esq., on behalf of the defendants' in support of [152-1] Motion for Summary Judgment dismissing the complaint and for Attorneys Fees & Costs.

Date Filed	No.	Docket Text
05/16/2003	155	MEMORANDUM OF LAW: by Michael J. Cahill, Esq., on behalf of the defendants' in support of [152-1] Motion for Summary Judgment dismissing the complaint and for Attorneys Fees & Costs.
05/16/2003	156	AFFIDAVIT: by Hans G. Arnold, Executive Director for the Oneida-Herkimer Solid Waste Management Authority, in support of [152-1] Motion for Summary Judgment dismissing the complaint and for Attorneys Fees & Costs.
05/16/2003	157	NOTICE OF APPENDICES: listed as A through J, filed on behalf of the defendants' in support of [152] Motion for Summary Judgment dismissing the Complaint and for Attorneys' Fees & Costs. (to be considered an attachment to docket [156-1].
05/16/2003	158	AFFIDAVIT: by Richard A. Frye, Esq., on behalf of County of Oneida in support of [152-1] Motion for Summary Judgment dismissing the complaint and for Attorneys Fees & Costs.
05/16/2003	159	AFFIDAVIT: by Krishna K. Singh, Esq., on behalf of County of Herkimer in support of [152-1]

Date Filed	No.	Docket Text
		Motion for Summary Judgment dismissing the complaint and for Attorneys Fees & Costs, w/attached exhibits A through C.
05/16/2003	161	Plaintiffs' Response Statement of Material Facts in Response to defendants' [152-1] Motion for Summary Judgment dismissing the complaint and for Attorneys Fees & Costs, and in support of plaintiffs' [160-1] Cross Motion for Partial Summary Judgment on the issue of Liability.
05/16/2003	162	AFFIDAVIT: by Kevin C. Murphy, Esq., on behalf of the plaintiffs' in support of [160-1] Cross Motion for Partial Summary Judgment on the issue of Liability, w/attached exhibits marked 52 through 60.
05/16/2003	163	MEMORANDUM OF LAW: by Kevin C. Murphy, Esq., on behalf of the plaintiffs' in opposition to [152-1] Motion for Summary Judgment dismissing the complaint and for Attorneys Fees & Costs, and in support of [160-1] Cross Motion for Partial Summary Judgment on the issue of Liability.
05/16/2003	164	REPLY MEMORANDUM OF LAW: by Michael J. Cahill, Esq., on behalf of defendants in

Date Filed	No.	Docket Text
-		response to and in further support of [152-1] Motion for Summary Judgment dismissing the complaint and for Attorneys Fees & Costs.
05/16/2003	165	REPLY AFFIDAVIT: by Kevin C. Murphy, Esq., on behalf of the plaintiffs in response to and in further support of [145-1] Motion for Partial Summary Judgment on the issue of Liability, and [160-1] Cross Motion for Partial Summary Judgment on the issue of Liability, w/attached exhibits marked 61 through 66.
05/16/2003	166	REPLY MEMORANDUM OF LAW: by Kevin C. Murphy, Esq., on behalf of plaintiffs in response to and in further support of [145-1] Motion for Partial Summary Judgment on the issue of Liability, and [160-1] Cross Motion for Partial Summary Judgment on the issue of Liability.
05/16/2003	167	DEFENDANTS' EXHIBITS: Volume I, listing exhibits 1 through 13 in support of defendants' [152] Motion for Summary Judgment dismissing the Complaint and for Attorneys' Fees & Costs.
05/16/2003	168	DEFENDANTS' EXHIBITS:

Date Filed	No.	Docket Text
		Volume II, listing exhibits 14 through 16 in support of defendants' [152] Motion for Summary Judgment dismissing the Complaint and for Attorneys' Fees & Costs.
05/16/2003	169	DEFENDANTS' EXHIBITS: Volume III, listing exhibits 17 and 18 in support of defendants' [152] Motion for Summary Judgment dismissing the Complaint and for Attorneys' Fees & Costs.
05/16/2003	170	DEFENDANTS' EXHIBITS: Volume IV, listing exhibits 19 through 21 in support of defendants' [152] Motion for Summary Judgment dismissing the Complaint and for Attorneys' Fees & Costs.
05/16/2003	171	DEFENDANTS' EXHIBITS: Volume V, listing exhibits 22 through 24 in support of defendants' [152] Motion for Summary Judgment dismissing the Complaint and for Attorneys' Fees & Costs.
05/16/2003	172	DEFENDANTS' EXHIBITS: Volume VI, listing exhibits 25 through 28 in support of defendants' [152] Motion for Summary Judgment dismissing the Complaint and for Attorneys'

Date Filed	No.	Docket Text
		Fees & Costs.
05/16/2003	173	DEFENDANTS' EXHIBITS: Volume VII, listing exhibits 29 and 30 in support of defendants' [152] Motion for Summary Judgment dismissing the Complaint and for Attorneys' Fees & Costs.
05/16/2003	174	DEFENDANTS' EXHIBITS: Volume VIII, listing exhibits 31 through 35 in support of defendants' [152] Motion for Summary Judgment dismissing the Complaint and for Attorneys' Fees & Costs.
05/16/2003	175	DEFENDANTS' EXHIBITS: Volume IX, listing exhibits 36 through 40 in support of defendants' [152] Motion for Summary Judgment dismissing the Complaint and for Attorneys' Fees & Costs.
06/13/2003	180	ORDER: the following motions are referred to Magistrate Judge David E. Peebles to conduct oral argument if necessary and to submit a Report & Recommendation to Judge Mordue for their disposition, Re: [140-1] Motion to Strike the Affidavit of Michael J. Cahill and Affidavit of Richard A. Frye,

Date Filed	No.	Docket Text
		[145-1] Motion for Partial Summary Judgment on the issue of Liability, [152-1] Motion for Summary Judgment dismissing the complaint and for Attorneys Fees & Costs, and [160-1] Cross Motion for Partial Summary Judgment on the issue of Liability (Signed by Judge Norman A. Mordue).
07/23/2003	181	Minute entry: Judge Mordue has requested Judge Peebles to prepare a Report & Recommendation regarding the pending motions for summary judgment. Judge hears oral argument from Atty. Kevin Murphy on behalf of the Pltfs. & Atty. Michael Cahill on behalf of the Defts. Judge reserves decision on the pending motions for summary judgment. A Report & Recommendation will be prepared by Judge Peebles shortly.
03/17/2004	183	REPORT AND RECOMMENDATIONS: Recommending that defendants' [152] Motion for Summary Judgment filed by County of Herkimer, New York, County of Oneida, Oneida-Herkimer Solid Waste Management Authority, be granted and that the [1] Complaint

Date Filed	No.	Docket Text
		be dismissed, recommending that the [145] Motion for Partial Summary Judgment filed by plaintiffs' be denied, recommending that the [160] Cross Motion for Partial Summary Judgment filed by plaintiffs' be denied and further recommending that the [140] Motion to Strike filed by plaintiffs' be granted in part, and that paragraphs five through forty-five of the Cahill Affirmation and paragraphs five through twenty-five of the Frye affidavit be stricken from the record. Objections to R&R due by 4/6/2004. Signed by Judge David E. Peebles on 3/17/04.
04/15/2004	188	OBJECTION to [183] Report and Recommendations by Bliss Enterprises, Inc., Bristol Trash Removal, Ingersoll Pickup Inc, Ken Wittman Sanitation, Levitt's Commercial Containers, Inc., Transfer Systems Inc, United Haulers Association, Inc.
04/26/2004		Motions No Longer Referred to Magistrate Judge Peebles: [160] Motion for Summary Judgment, [145] Motion for Summary Judgment, [140] Motion to Strike, [152] Motion for Summary Judgment.

Date Filed	No.	Docket Text
05/14/2004	189	MEMORANDUM OF LAW In Response to Plaintiffs Objections to Magistrates' Report and Recommendations filed by Oneida-Herkimer Solid Waste Management Authority.
03/24/2005	191	MEMORANDUM-DECISION & ORDER: adopting the [183] Report and Recommendations in its entirety therefore denying plaintiffs' [145] Motion for Summary Judgment, denying plaintiffs' [160] Motion for Summary Judgment, granting in part and denying in part plaintiffs' [140] Motion to Strike, ordered that paragraphs 5 through 45 of the Cahill Affirmation and paragraphs 5 through 25 of the Frye affidavit be stricken from the record, further ordered granting defendants' [152] Motion for Summary Judgment and the complaint is dismissed. Signed by Judge Norman A. Mordue on 3/24/05
03/24/2005	192	JUDGMENT in favor of defendants against plaintiffs.
04/22/2005	193	NOTICE OF APPEAL as to [192] Judgment by United Haulers Association, Inc., Transfer Systems Inc, Bliss Enterprises,

Date Filed	No.	Docket Text
		Inc., Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial Containers, Inc., Ingersoll Pickup Inc.
03/27/2006	199	MANDATE of USCA as to [193] Notice of Appeal, filed by United Haulers Association, Inc., Transfer Systems Inc, Bliss Enterprises, Inc., Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial Containers, Inc., Ingersoll Pickup Inc. The Judgment of the District Court is hereby AFFIRMED in accordance with the opinion of the Second Circuit Court of Appeals. {Issued as a mandate on 3/14/06}.

U.S. COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 00-7593

United Haulers Ass'n., Inc., et al.,
Plaintiffs-Appellees,
v.
Oneida-Herkimer Solid Waste Management Authority, et al.,
Defendants-Appellants.

RELEVANT DOCKET ENTRIES

Date Filed	Docket Text
05/10/00	Copy of notice of appeal and district court docket entries on behalf of Appellant Oneida-Herkimer in 00-7593 filed.
05/10/00	Copy of notice of appeal and district court docket entries on behalf of Appellant County of Oneida in 00-7595 filed.
05/10/00	Copy of notice of appeal and district court docket entries on behalf of Appellant County of Herkimer in 00-7597 filed.
08/03/00	Appellant County of Oneida in 00-7593 brief FILED with proof of service.
08/03/00	Appellant Oneida-Herkimer in 00-7593 brief FILED with proof of service.
08/03/00	Appellant Oneida-Herkimer in 00-7593, Appellant County of

Date Filed	Docket Text
	Oneida in 00-7593, Appellant County of Herkimer in 00-7593 joint appendix filed w/pfs. Number of volumes: one.
8/11/00	Appellant County of Herkimer in 00-7593 brief FILED with proof of service.
09/07/00	Appellee United Haulers Assoc in 00-7593, Appellee Transfer Systems, Inc. in 00-7593, Appellee Bliss Enterprises in 00-7593, Appellee Ken Wittman Sanitation in 00-7593, Appellee Bristol Trash Removal in 00-7593, Appellee Levitt's Commercial in 00-7593, Appellee Ingersoll Pickup Inc. in 00-7593 brief filed with proof of service.
09/27/00	Appellant Oneida-Herkimer in 00-7593 reply brief filed with proof of service.
09/29/00	Appellant County of Herkimer in 00-7593 reply brief filed with proof of service.
09/29/00	Appellant County of Oneida in 00-7593 reply brief filed with proof of service.
10/13/00	Amicus Curiae N.Y.S. Assoc. for So in 00-7593 brief filed with proof of service.

Date Filed	Docket Text
11/08/00	Set for argument on 12/19/00.
12/19/00	Case heard before MESKILL, LEVAL, CALABRESI C.JJ. (Tape: #99+100)
12/29/00	Order filed stating: The parties shall submit supplemental briefs by January 26, 2001, addressing the questions listed below. The New York State Association for solid Waste Management is granted leave to submit additional briefing as amicus on these issues. Before: Hon. Meskill, Hon. Leval and Hon. Calabresi, C.JJ. (12/29/00 RAA)
01/26/01	Appellee United Haulers Assoc. in 00-7593, Appellee Transfer Systems, Inc. in 00-7593, Appellee Bliss Enterprises in 00-7593, Appellee Ken Wittman Sanitation in 00-7593, Appellee Bristol Trash Removal in 00-7593, Appellee Levitt's Commercial in 00-7593, Appellee Ingersoll Pickup Inc. in 00-7593 supplemental brief filed with proof of service.
01/26/01	Amicus Curiae N.Y.S. Assoc. for So in 00-7593 supplemental brief filed with proof of service.
01/26/01	Appellant Oneida-Herkimer in

Date Filed	Docket Text
	00-7593, Appellant County of Oneida in 00-7593, appellant County of Herkimer in 00-7593 affidavit in support of supplemental brief filed with proof of service.
01/26/01	Appellant Oneida-Herkimer in 00-7593, Appellant County of Oneida in 00-7593, appellant County of Herkimer in 00-7593 joint supplemental brief filed with proof of service.
07/27/01	Judgment of the district court is REVERSED & REMANDED by published signed opinion filed. (TJM)
07/27/01	Judge Calabresi concurring in a separate opinion filed.
07/27/01	Judgment filed.
08/21/01	Judgment MANDATE ISSUED.
11/14/01	Notice of filing petition for writ of certiorari for Appellee United Haulers Assoc. in 00-7593, Appellee Transfer Systems, Inc., in 00-7593, Appellee Bliss Enterprises in 00-7593, Appellee Ken Wittman Sanitation in 00-7593, Appellee Bristol Trash Removal in 00-7593, Appellee Levitt's Commercial in 00-7593,

Date Filed	Docket Text
	Appellee Ingersoll Pickup Inc., in 00-7593 dated 11/9/01 filed. Supreme Ct. No. 01-686.
01/11/02	Letter dated 1/7/02 from the Supreme Court advising of order DENYING petition for writ of certiorari [1965748-1] by Appellee United Haulers Assoc., Transfer Systems, Inc., Bliss Enterprises, Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial, Ingersoll Pickup Inc., endorsed on motion dated 11/14/01. FILED. (Supreme Court No. 01-686)

U.S. COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 05-2024-cv

United Haulers Ass'n., Inc., et al.,
Plaintiffs-Appellants,
v.
Oneida-Herkimer Solid Waste Management Authority, et al.,
Defendants-Appellees.

RELEVANT DOCKET ENTRIES

Date Filed	Docket Text
04/25/05	Copy of notice of appeal and district court docket entries on behalf of APPELLANT Bliss Enterprises, Inc., Bristol Trash Removal, Ingersoll Pickup, Inc., Ken Wittman Sanitation, et al., filed.
8/29/05	APPELLEES County of Herkimer, New York, County of Oneida, Oneida-Herkimer Solid Waste Management Authority, joint brief filed with proof of service.
09/08/05	AMICUS CURIAE Attorney General for the State of New York, brief filed with proof of service.
09/13/05	AMICUS CURIAE Bristol Resource Recovery Facility Operating Committee, brief filed with proof of service.
09/22/05	Amicus Curiae Attorney General

Date Filed	Docket Text
	for the State of New York motion allow oral argument filed with proof of service.
10/03/05	APPELLANT Bliss Enterprises, Inc., Bristol Trans Removal, Ingersoll Pickup, Inc., Ken Wittman, Sanitation, et al., reply brief filed with proof of service.
10/26/05	Set for argument on 12/14/05.
11/16/05	Order FILED GRANTING motion to participate in oral argument, 10 minutes to be divided between appellee and State amicus; as amicus by amicus Curiae Attorney General for the State of New York, Appellant United Haulers Association, Inc., Appellant Transfer Systems, Inc., Appellant Bliss Enterprises, Inc., Appellant Ken Wittman Sanitation, Appellant Bristol Trash Removal, Appellant Levitt's Commercial Containers, Inc., Appellant Ingersoll Pickup, Inc., endorsed on motion dated 9/22/05 (for the Court-AV).
12/14/05	Case heard before CALABRESI, KATZMANN, WESLEY, C.JJ
02/16/06	Judgment of the district court is Affirmed by published signed opinion filed.

Date Filed	Docket Text
02/16/06	Judgment filed.
03/14/06	Judgment MANDATE ISSUED. CLOSED.
05/01/06	Notice of filing petition for APPELLANT Bliss Enterprises, Inc., Bristol Trash Removal, Ingersoll Pickup, Inc., Ken Wittman Sanitation, et al., dated 4/24/06 filed. Supreme Court No. 05-1345.
10/05/06	Letter dated 9/26/06 from the Supreme Court advising of order GRANTED petition for writ of certiorari by APPELLANT Bliss Enterprises, Inc., Bristol Trans Removal, Ingersoll Pickup, Inc., Ken Wittman Sanitation, et al., filed. (Supreme Court No. 05-1345)
10/05/06	Writ of Certiorari GRANTED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED HAULERS ASSOC., INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC. and INGERSOLL PICKUP, INC.,

Plaintiffs,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA and COUNTY OF HERKIMER,

Defendants.

Case Number: 95-CV-0516

COMPLAINT

The Plaintiffs, by and through their attorneys, Young Stockli & Rowe, as and for their complaint against the Defendants, allege as follows:

PRELIMINARY STATEMENT

1. This is an action pursuant to 42 U.S.C. §1983, the Declaratory Judgment Act, 28 U.S.C. §2201, *et seq.*, and the Commerce Clause of the United States Constitution seeking a determination that Oneida County Local Law No. 1 of 1990 and Herkimer County Local Law No. 1 of 1990 (hereinafter collectively referred to as "Flow Control Laws"), facially and as applied, unconstitutionally discriminate and/or unduly burden interstate commerce in violation of Article I, section 8, clause 3 of the Commerce Clause of the United States Constitution by requiring that solid waste generated, originated or brought within Oneida and Herkimer Counties

(hereinafter collectively referred to as "Counties") be transferred to and/or disposed at facilities designated by the respective County or the Oneida-Herkimer Solid Waste Management Authority pursuant to contract with the Counties, and that said discrimination constitutes a deprivation under color of law and regulation of the Plaintiffs' rights, privileges and immunities secured by the United States Constitution in violation of 42 U.S.C. §1983. Plaintiffs seek an injunction barring enforcement of the Flow Control Laws, and the contracts, regulations and resolutions entered into, enacted and/or adopted in accordance therewith, and further seek damages for the deprivation of Plaintiffs' constitutional rights and attorneys' fees in accordance with 42 U.S.C. §1988.

JURISDICTION

2. This Court has jurisdiction over this case pursuant to 28 U.S.C. §§1331 and 1343(a)(3) because this case requires resolution of a federal question under the Commerce Clause of the United States Constitution and is brought pursuant to 42 U.S.C. §1983.

VENUE

3. This case is properly venued in the Northern District of New York pursuant to 28 U.S.C. §§1391(b) and (c) because the Plaintiffs' causes of action arose in this District and all parties are located within this District.

PARTIES

4. The Plaintiff United Haulers Assoc., Inc. (the "Association") was and is a not-for-profit New York corporation doing business in the State of New York with its principal place of business located at P.O. Box 283, Westmoreland, New York. At all times relevant to the allegations of this complaint, the Association was and is a not-for-profit corporation comprised of solid waste management companies engaged in the collection, transport,

processing and/or disposal of solid waste generated, originated or brought within the Counties of Oneida and Herkimer.

5. The Plaintiff Transfer Systems, Inc. ("TSI") was and is a New York corporation doing business in the State of New York with its principal place of business located at R.D. 2 Dyke Road in Frankfort, New York. At all times relevant to the allegations of this complaint, TSI was and is a corporation engaged in the collection, transport, processing and disposal of solid waste generated, originated or brought within the Counties of Oneida and Herkimer.

6. The Plaintiff Bliss Enterprises, Inc. ("Bliss") was and is a New York corporation doing business in the State of New York with its principal place of business located at R.D. 2 Hillsboro Road in Camden, New York. At all times relevant to the allegations of this complaint, Bliss was and is a corporation engaged in the collection, transport, processing and disposal of solid waste generated, originated or brought within the Counties of Oneida and Herkimer.

7. The Plaintiff Ken Wittman Sanitation ("Wittman") was and is a sole proprietorship doing business in the State of New York with its principal place of business located at 19 Tibbitts Road in New Hartford, New York. At all times relevant to the allegations of this complaint, Wittman was and is a business engaged in the collection, transport, processing and disposal of solid waste generated, originated or brought within the Counties of Oneida and Herkimer.

8. The Plaintiff Bristol Trash Removal ("Bristol") was and is a sole proprietorship doing business in the State of New York with its principal place of business located at Gore Road in Rome, New York. At all times relevant to the allegations of this complaint, Bristol was and is a business engaged in the collection, transport, processing and disposal of solid waste generated, originated or brought within the Counties of Oneida and Herkimer.

9. The Plaintiff Levitt's Commercial Containers, Inc. ("Levitt's") was and is a New York corporation doing business in the State of New York with its principal place of business located at 867 Route 5 in Utica, New York. At all times relevant to the allegations of this complaint, Levitt's was and is a corporation engaged in the collection, transport, processing and disposal of solid waste generated, originated or brought within the Counties of Oneida and Herkimer.

10. The Plaintiff Ingersoll Pickup, Inc. ("Ingersoll") was and is a New York corporation doing business in the State of New York with its principal place of business located at Box 145A, Military Road in Poland, New York. At all times relevant to the allegations of this complaint, Ingersoll was and is a corporation engaged in the collection, transport, processing and disposal of solid waste generated, originated or brought within the Counties of Oneida and Herkimer.

11. At all times relevant hereto, the Defendant Oneida County was and is a municipal corporation of the State of New York, constituting a political subdivision thereof, created and existing under the laws of the State of New York with offices at 800 Park Avenue in Utica, New York.

12. At all times relevant hereto, the Defendant Herkimer County was and is a municipal corporation of the State of New York, constituting a political subdivision thereof, created and existing under the laws of the State of New York with offices at P.O. Box 471, County Office Building in Herkimer, New York.

13. At all times relevant hereto, the Defendant Oneida-Herkimer Solid Waste Management Authority was and is a public benefit corporation and a body corporate and politic, created and existing under the laws of the State of New York, with offices located at 311 Turner Street, Suite 401, in Utica, New York.

GENERAL ALLEGATIONS

14. The Oneida-Herkimer Solid Waste Management Authority Act (hereinafter the "Act") was enacted by the New York State Legislature in 1988, with an effective date of September 1, 1988.

15. Pursuant to the Act, a public benefit corporation known as the Oneida-Herkimer Solid Waste Management Authority (hereinafter the "Authority") was created with the powers and duties set forth in Title 13-FF of the New York State Public Authorities Law ("PAL").

16. The Act grants the Authority the power to, among other things, collect, receive, transport, process, dispose of and deal with solid waste and any byproducts thereof generated in the Counties.

17. The Act further grants the Authority the power to contract with the Counties for the development or construction of solid waste management-resource recovery facilities, as defined in PAL §2049-bb(16), and grants the Authority the power to contract with the Counties so as to provide sufficient revenues to pay the principal and interest on the bonds of the Authority as the same shall become due.

18. The Act at PAL §2049-ee(8) states that the Authority has the power to contract with the Counties for the delivery of all solid waste generated within the Counties to a specific solid waste management-resource recovery facility, and prohibits the Authority from receiving, collecting, treating or disposing of solid waste (other than recyclables) generated outside the Counties.

19. The Act at PAL §2049-tt(2) states that the Counties may enter into contracts with the Authority which require the Counties to deliver or cause to be delivered all of the solid waste generated, originated or brought within the Counties to facilities designated by the Authority.

20. The Act at PAL §2049-tt(3) states that the Counties, as instrumentalities of the State, may adopt "local laws, ordinances and regulations imposing appropriate and reasonable limitations on competition with respect to collecting, receiving, transporting, delivering, storing, processing and disposing of solid waste," including local laws which require that all solid waste generated, originated or brought within the boundaries of the Counties be brought to solid waste management-resource recovery facilities owned and/or operated by the Authority.

21. The Act provides that any such local law adopted by the Counties, or one of them, may contain enforcement and penalty provisions providing for the imposition of civil penalties, fines, monetary charges or the suspension or revocation of permits or licenses granted by any jurisdiction for the collection, receiving, transporting, delivery or storing of solid waste.

22. The Act states that the Counties may contract with the Authority so as to obligate the Counties to pay such amounts as shall be necessary to assure the continued operation and solvency of the Authority.

23. Allegedly pursuant to the Act, on or about May 10, 1989, the Authority entered into a Solid Waste Management Agreement ("May 1989 Agreement") with the Counties, wherein the Authority agreed to, among other things, operate certain existing solid waste management facilities, to study the solid waste and recycling needs of the Counties' residents and to manage and dispose of all solid waste, including recyclables, generated, originated or brought within the Counties.

24. In the May 1989 Agreement, the Authority agreed to take over the operation of the Oneida County Energy Recovery Facility ("ERF") in Rome, New York commencing on January 1, 1990, and to charge a tipping and/or disposal fee sufficiently high to cover (among other things) the costs

of outstanding capital and interest expenses and principal and other debt and operating and maintenance expenses.

25. In the May 1989 Agreement, the Authority further agreed to supervise and administer the planning, design, equipping and operation of a Materials Recovery Facility, also known as the Oneida-Herkimer Recycling Center, in Utica, New York ("Recycling Center") and to either purchase or operate said facility in the future, paying the operating and maintenance costs associated with said facility.

26. In the May 1989 Agreement, the Counties agreed to direct all recyclables collected from residences in the Counties to the Recycling Center upon its completion, or to another Authority-designated facility.

27. In the May 1989 Agreement, the Counties conveyed to the Authority all rights to solid waste generated, originated or brought within the Counties and, in doing so, relied on PAL §2049-tt as the enabling legislation for such an agreement.

28. In the May 1989 Agreement, the Counties also delegated to the Authority the right to select the sites for solid waste management facilities to handle waste generated, originated or brought within the Counties.

29. In the May 1989 Agreement, the County agreed to deliver or cause to be delivered all solid waste originated or brought within the Counties to solid waste management facilities designated, owned and/or operated by the Authority.

30. In the May 1989 Agreement, the Authority agreed to assume regulatory powers (including permitting and enforcement authority) with regard to private haulers operating within the Counties and was granted the power to establish tipping fees and user fees to finance the operation, maintenance and costs of the ERF, the Recycling Center and any additional facilities built by or for the Authority.

31. Allegedly pursuant to the Act, in or about December of 1989, the Oneida County Board of Legislators enacted Oneida County Local Law No. 1 of 1990 ("Oneida Law") which requires that all solid waste and recyclables generated within Oneida County be hauled and/or delivered by a hauler permitted by Oneida County or the Authority to a facility designated by Oneida County or by the Authority pursuant to contract with Oneida County.

32. The Oneida Law requires the removal of solid waste and recyclables from the property on which they are generated to be performed by the municipality, a licensed private hauler or the individual generator and requires that such solid waste and/or recyclables be delivered to a facility designated by Oneida County or the Authority pursuant to contract with Oneida County.

33. Pursuant to the Oneida Law, tipping fees and other charges for the handling and disposal of solid waste are established by the Oneida County Board of Legislators upon its own initiative, upon the recommendation of the Oneida County executive or by the Authority pursuant to contract with Oneida County.

34. The Oneida Law requires that any person commercially collecting, picking up or removing solid waste and/or recyclables generated in Oneida County obtain a permit from Oneida County or from the Authority pursuant to contract with Oneida County.

35. A failure to comply with the Oneida Law, including the failure to deliver solid waste to an Authority-designated facility, subjects the violator to civil penalties, fines, imprisonment and/or the loss of the violator's solid waste collection and disposal permit.

36. Allegedly pursuant to the Act, in or about February of 1990, the Herkimer County Legislature ("Legislature") enacted Herkimer County Local Law No. 1 of 1990

("Herkimer Law"), which requires that all solid waste and recyclable material generated within Herkimer County be hauled and/or delivered by a hauler permitted by Herkimer County or the Authority to a facility designated by the Legislature or by the Authority pursuant to a contract with Herkimer County.

37. The Herkimer Law requires that all persons or companies engaged in the commercial collection, pick-up, transfer, removal and/or disposal of solid waste and/or recyclables obtain a permit issued by Herkimer County or by the Authority pursuant to contract with Herkimer County.

38. The Herkimer Law prohibits the placement of solid waste and/or recyclables at property within Herkimer County for collection unless that property generated said material.

39. The Herkimer Law requires the removal of garbage and recyclables (as defined therein) from the property on which they are generated to be performed by the municipality, a licensed private hauler or the individual generator and the delivery of such material at a disposal location approved by Herkimer County or the Authority pursuant to contract with Herkimer County. Tipping fees and other charges for the handling and disposal of recyclables are established by the Legislature or by the Authority pursuant to contract with Herkimer County.

40. The Herkimer Law requires the disposal of residential, commercial and industrial construction and demolition ("C&D") debris at the "Demolition Debris Disposal Site" or at another "suitable site as designated by the Legislature." Tipping fees and other charges for the handling and disposal of this material are established by the Legislature or by the Authority pursuant to contract with Herkimer County.

41. The Herkimer Law requires that yard waste be composted by Herkimer County at sites designated by the

Legislature or by the Authority pursuant to contract with Herkimer County, but does not prohibit private composting of yard waste. Tipping fees and other charges for the handling and disposal of residential yard waste are established by the Legislature.

42. The Herkimer Law requires that commercial and industrial waste, major appliances, large household furnishings, vehicular tires, household hazardous waste and infectious waste collected by private haulers be delivered to a facility or site designated or approved by the Legislature or by the Authority pursuant to contract with Herkimer County. Tipping fees and other charges for the handling and disposal of this material, with the exception of infectious waste, are established by the Legislature or by the Authority pursuant to contract with Herkimer County.

43. A failure to comply with the Herkimer Law (including the failure to deliver solid waste to an Authority-designated facility) subjects the violator to civil penalties, fines, imprisonment, revocation of the violator's solid waste collection and disposal permit and/or revocation of all rights and privileges to collect, pick up, transfer, remove or dispose of solid waste or recyclables as defined therein.

44. On or about December 28, 1989, the Authority and the Counties entered into a second Solid Waste Management Agreement (hereinafter "December 1989 Agreement").

45. Pursuant to the December 1989 Agreement, the Authority agreed to manage the solid waste generated, originated or brought within the Counties by receiving, treating and disposing of such solid waste, including recyclables, at Authority-designated facilities.

46. Pursuant to the December 1989 Agreement, the Authority agreed to issue, sell and deliver bonds to finance its management of solid waste generated, originated or brought within the Counties in reliance upon the Counties'

agreement to pay the Authority's operating costs and debt service less the amount of monies received by the Authority from tipping fees or other funds levied or raised for the receipt, processing and disposal of solid waste, including recyclables.

47. Pursuant to the May and December 1989 Agreements, the Authority has been delegated the power and responsibility for enforcing the Flow Control Laws, which such power includes the power to revoke the licenses of private haulers refusing to comply with the Flow Control Laws and the power to designate the facilities to which solid waste and/or recyclables originated, generated or brought within the Counties must be delivered for processing and/or disposal.

48. The Authority has adopted and enforced policies, resolutions and/or regulations which require the Plaintiffs and other private haulers to transport and/or dispose of all solid waste and recyclables that originated, are generated and/or are brought within the Counties at facilities owned and/or operated by the Authority and located within the Counties.

49. The Authority administers, issues and enforces the solid waste collection and disposal permit system for the public and private collectors of solid waste and recyclables generated in the Counties.

50. In March of 1990, the Authority issued $42.8 million in variable rate revenue bonds and utilized these funds to, among other things, purchase the ERF, the Ash Landfill on Tannery Road in Rome, New York ("Ash Landfill") and the Recycling Center, to complete construction of the Recycling Center, to construct the Green Waste Compost Facility in Utica, New York ("Compost Facility") and to reimburse the Counties for monies spent on planning and construction costs.

51. In 1991, the Authority issued $8.1 million in Solid Waste System Revenue Bonds to, among other things, finance the acquisition and construction of a transfer station in Utica, New York (the "Transfer Station").

52. In 1992, the Authority issued $50,510,000 in Solid Waste System Revenue Bonds to, among other things, finance the redemption of the 1990 and 1991 bonds.

53. The Authority currently owns and operates the ERF, the Ash Landfill, the Recycling Center, and the Compost Facility.

54. The Authority also owns the Transfer Station which is operated by Empire Sanitary Landfill, Inc. pursuant to contract with the Authority.

55. The Authority is currently vested with all solid waste management responsibilities for the Counties and has designated the above-referenced facilities for the receipt, treatment and/or disposal of solid waste and/or recyclables generated, originated and/or brought within the Counties.

56. The Ash Landfill and the Transfer Station accept solid waste and C&D debris. Pursuant to the Flow Control Laws, the May 1989 Agreement, the December 1989 Agreement and, upon information and belief, pursuant to the policies, regulations and/or resolutions enacted and/or adopted by the Authority, except as provided below in paragraphs 57 through 64, all solid waste originated, generated or brought within the Counties must be delivered to and/or disposed at the Ash Landfill, the ERF, the Transfer Station, the Green Waste Compost Facility or the Recycling Center as designated by the Authority.

57. Upon information and belief, the Compost Facility accepts only green waste (as defined in the Flow Control Laws). Pursuant to the Flow Control Laws, the May 1989 Agreement, the December 1989 Agreement and, upon information and belief, pursuant to the policies, regulations

and/or resolutions enacted and/or adopted by the Authority, all green or yard waste generated in the Counties, which is not privately composted, must be delivered to the Authority's Compost Facility.

58. Upon information and belief, the Recycling Center began operating in February of 1991 and primarily processes mixed household recyclables. The Recycling Center also accepts recyclables from commercial, industrial and institutional establishments in the Counties. Pursuant to the Flow Control Laws, the May 1989 Agreement, the December 1989 Agreement and, upon information and belief, pursuant to the policies, regulations and/or resolutions enacted and/or adopted by the Authority, all recyclables generated in the Counties must be delivered to the Recycling Center for processing. The Authority sells the recyclables it receives from Plaintiffs.

59. Upon information and belief, the ERF was constructed in 1985 by Oneida County to incinerate municipal solid waste for western Oneida County and to sell energy in the form of steam to Griffiss Air Force Base ("GAFB").

60. Upon information and belief, GAFB decided to no longer purchase steam produced by the ERF and the Authority determined that, as a result, operation of the ERF would no longer be cost-effective. Accordingly, the Authority has discontinued operation of the ERF as an incinerator but, upon information and belief, still operates the ERF as a transfer station.

61. Pursuant to Authority resolution, C&D debris can be disposed at and/or delivered to the Ash Landfill or the Transfer Station and can also be delivered to other facilities within the Counties for the term of any contracts between Plaintiffs and said facilities which were in existence and legally binding as of February 15, 1993.

62. Pursuant to Authority resolution, C&D debris can also be delivered to other permitted facilities in the Counties for processing, recycling and recovery only, provided that the C&D waste from such facilities is subsequently delivered to the Authority's Transfer Station for delivery to the Empire Landfill.

63. In or about June of 1991, the Authority awarded a five-year contract to Empire Sanitary Landfill in Taylor, Pennsylvania ("Empire Landfill") for the disposal of non-recyclable waste generated or originated in the Counties. This agreement obligates the Authority to deliver or cause to be delivered solid waste generated or originated in the Counties to a Transfer Station owned by the Authority and operated by Empire Sanitary Landfill, Inc. ("Empire") in Utica, New York, for subsequent disposal at the Empire Landfill.

64. In 1994, the Authority amended its agreement with Empire so as to extend its term through 1998. The contract between the Authority and Empire provides for a tipping fee of $56 per ton for the period 1995 through 1998. This disposal rate is charged to the Authority by Empire for solid waste delivered to the Transfer Station for disposal.

65. The Authority has not yet sited a new County landfill but has chosen candidate sites in the Counties. The Authority's current use of an out-of-State landfill for the ultimate disposal of solid waste generated in the Counties is anticipated by the Authority as only temporary and the Authority intends to eventually dispose of, and require the disposal of, all waste originated, generated or brought within the Counties at a landfill owned and/or operated by the Authority in the Counties.

66. Development costs for the Authority's new landfill have been estimated by the Authority at $34-41 million, with a resulting disposal cost of approximately $53 to $74 per ton, plus additional service costs of approximately $25 per ton.

67. Upon information and belief, the Flow Control Laws, the May 1989 Agreement, the December 1989 Agreement and the policies, rules, regulations and/or resolutions promulgated in accordance therewith were enacted, adopted and/or entered into in order to finance the Authority's purchase of certain solid waste management facilities from the Counties, to reimburse the Counties for planning and construction costs associated with solid waste management facilities, to finance the acquisition and construction of the Transfer Station and the Compost Facility, and to finance a new County landfill to handle solid waste generated, originated or brought within the Counties.

68. Pursuant to the Flow Control Laws, the May 1989 Agreement, the December 1989 Agreement and, upon information and belief, pursuant to the policies, rules, regulations and/or resolutions enacted and/or adopted by the Authority, except as provided in paragraphs 61 and 62 for C&D debris and paragraph 57 for green waste, the following facilities are the only facilities to which Plaintiffs and other private haulers can transport and/or dispose of solid waste and/or recyclables generated, originated or brought within the Counties: (1) the Transfer Station in Utica, New York; (2) the Ash Landfill in Rome, New York; (3) the Recycling Center in Utica, New York; (4) the Green Waste Compost Facility in Utica, New York; and (5) the ERF in Rome, New York.

69. Pursuant to the Authority's 1995 Rules and Regulations, all haulers, including Plaintiffs, must obtain a Solid Waste Collection and Disposal Permit from the Authority pursuant to the Flow Control Laws and must pay the Authority the following tipping fees for 1995:

(a) Solid Waste Disposal: $86 per ton of solid waste unless witnessed disposal is required or the solid waste load contains greater than 25% recyclables, in which case the charge is $172 per ton.

(b) C&D Debris Disposal: $67 per ton at the Transfer Station; $40 per ton at the Ash Landfill; $86 per ton if mixed with solid waste; and $172 per ton if mixed with greater than 25% recyclables.

70. But for the Flow Control Laws, the May 1989 Agreement, the December 1989 Agreement and the contracts, rules, regulations and resolutions adopted or enacted in accordance therewith, the Plaintiffs could deliver and dispose of solid waste generated, originated or brought within the Counties at other facilities, including out-of-State facilities, for substantially less cost per ton of solid waste.

71. In May of 1994, the United States Supreme Court in *C&A Carbone, Inc. v. Town of Clarkstown*, 114 S.Ct. 1677 (1994), held that an ordinance requiring the delivery of all non-hazardous solid waste within or generated within the town to a transfer station located within the town violated the Commerce Clause of the United States Constitution, despite the argument that the flow control ordinance served a legitimate local purpose in ensuring the safe handling and proper treatment of solid waste.

72. Despite the decision in *Carbone*, the Defendants have indicated to Plaintiffs their intent to enforce and have enforced the Flow Control Laws and the rules, regulations and/or resolutions enacted and/or adopted in accordance therewith.

FIRST CAUSE OF ACTION

(Commerce Clause Claim - Discrimination Against Interstate Commerce)

73. Plaintiffs reallege and incorporate by reference the allegations set forth in paragraphs 1 through 72 herein as if fully set forth herein.

74. The Flow Control Laws, in conjunction with the May 1989 Agreement, the December 1989 Agreement and the

policies, rules, regulations and resolutions adopted or promulgated by the Authority in accordance therewith, prohibit the Plaintiffs from collecting solid waste that originated, was generated or was brought within the Counties and delivering or disposing of such waste at any location other than at a facility located in the Counties and designated by the Authority.

75. The Authority-designated facilities are solely located within Oneida County, thereby precluding Plaintiffs from delivering or disposing of waste that originated, was generated or was brought within the Counties at other facilities, including out-of-State facilities.

76. The Authority-designated facilities are owned by the Authority, or either operated by the Authority or by a vendor selected by the Authority, thereby precluding other facilities or operations — including out-of-State facilities — from competing for Plaintiffs' business.

77. The Authority-mandated tipping fees exceed the tipping fees charged by other facilities, including out-of-State transfer stations and disposal facilities, which has caused the Plaintiffs to incur excessive handling and disposal fees for waste generated, originated or brought within the Counties.

78. But for the Flow Control Laws, together with the May 1989 Agreement, the December 1989 Agreement and the policies, rules, regulations and/or resolutions enacted and/or adopted in accordance therewith, Plaintiffs could legally deliver solid waste that originated, was generated or was brought within the Counties, and collected by Plaintiffs, to other facilities, including out-of State disposal facilities, at significantly lower cost than what is currently charged at the Authority's facilities designated above.

79. The Plaintiffs currently collect and transport solid waste and recyclables generated, originated or brought within the Counties pursuant to permits issued by the Authority.

80. By prohibiting the flow of solid waste generated, originated or brought within the Counties to other facilities, including out-of-State facilities, the Flow Control Laws, together with the May 1989 Agreement, the December 1989 Agreement and the policies, rules, regulations and/or resolutions enacted and/or adopted in accordance therewith, are unconstitutional, void, discriminatory and constitute an unreasonable interference with and undue burden on interstate commerce, all in violation of Article I, section 8, clause 3, of the United States Constitution which provides, in part, that "Congress shall have the power . . . to regulate commerce . . . among the several States . . . ."

81. The Flow Control Laws, together with the May 1989 Agreement, the December 1989 Agreement and the policies, rules, regulations and/or resolutions enacted and/or adopted in accordance therewith, are unconstitutional because they hinder and obstruct the free flow of solid waste, unreasonably burden and impede the free flow of interstate commerce, discriminate against interstate commerce and constitute an undue burden on interstate commerce, all of which is contrary to Article 1, section 8, clause 3 of the United States Constitution.

82. The Flow Control Laws, together with the May 1989 Agreement, the December 1989 Agreement and the policies, rules, regulations and/or resolutions enacted and/or adopted in accordance therewith, are unconstitutional, void and in direct conflict with Article VI, Clause 2 of the United States Constitution, which provides that "[t]his Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

83. The Flow Control Laws, together with the May 1989 Agreement, the December 1989 Agreement and the policies, rules, regulations and/or resolutions enacted and/or adopted

in accordance therewith, are financing measures for the construction and operation of solid waste management facilities in the Counties.

84. The Plaintiffs, and members of the Plaintiff Association, as licensed waste management companies within the counties of Herkimer and Oneida, must comply with the Flow Control Laws and the rules, regulations and/or resolutions enacted and/or adopted in accordance therewith or face revocation of their license to operate in the Counties in addition to imprisonment, penalties and/or fines.

85. The Flow Control Laws and the rules, regulations and/or resolutions enacted and/or adopted in accordance therewith have been enforced by the Defendants and Defendants continue to threaten enforcement against Plaintiffs.

86. In view of the actual and/or threatened enforcement of the Flow Control Laws, and the rules, regulations and/or resolutions enacted and/or adopted in accordance therewith, and Plaintiffs' contention that the enforcement of the Flow Control Laws, and the rules, regulations and/or resolutions enacted and/or adopted in accordance therewith, is unconstitutional and deprives Plaintiffs of their rights under the Commerce Clause, there is an actual controversy within the jurisdiction of this Court, requiring adjudication of the rights of the parties.

SECOND CAUSE OF ACTION

(Claim for Damages Under 42 U.S.C. §1983)

87. Plaintiffs reallege and incorporate by reference the allegations set forth in paragraphs 1 through 86 as if fully set forth herein.

88. The Civil Rights Act, 42 U.S.C. §1983, provides that "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or

other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

89. The Flow Control Laws and the Act are statutes of the State within the meaning of 42 U.S.C. §1983.

90. Defendants are each a "person" within the meaning of 42 U.S.C. §1983.

91. The policies, rules, regulations and/or resolutions of the Counties and/or the Authority are regulations and/or ordinances of the State within the meaning of 42 U.S.C. §1983 and were enacted, adopted or promulgated under color of the Flow Control Laws and the Act.

92. The May 1989 and December 1989 Agreements establish customs or usages of the State within the meaning of 42 U.S.C. §1983 and were enacted, adopted or promulgated under color of the Flow Control Laws and the Act.

93. Pursuant to 42 U.S.C. §1988(b), in any action or proceeding to enforce 42 U.S.C. §1983, the court may award the prevailing party reasonable attorneys' fees.

94. The requirement imposed by the Flow Control Laws, the May 1989 Agreement, the December 1989 Agreement and the policies, rules, regulations and resolutions enacted and/or adopted by the Authority that Plaintiffs deliver and dispose of all waste generated, originated or brought within the Counties to facilities designated by the Authority deprives Plaintiffs, under color of State law, of rights secured by the Commerce Clause of the United States Constitution.

95. Plaintiffs have suffered and will continue to suffer damages as a result of Defendants' actions under color of State law, including (but not limited to) excessive tipping and

disposal fees and the costs and attorneys' fees incurred in this action.

WHEREFORE, Plaintiffs request judgment in their favor and against Defendants as follows:

1. Granting a preliminary and permanent injunction:

(a) prohibiting the enforcement of the Flow Control Laws, the May 1989 Agreement and the December 1989 Agreement;

(b) prohibiting the enforcement of the policies, rules, regulations and resolutions adopted and/or promulgated by the Authority which mandate delivery and/or disposal of waste originated, generated or brought within the Counties at Authority-designated facilities; and

(c) enjoining Defendants from prohibiting or otherwise interfering with the collection, processing, transfer and/or disposal of waste originated, generated, brought or collected within the Counties to or at processing, transfer and/or disposal facilities other than those designated by the Defendants;

2. Declaring that the Flow Control Laws, the May 1989 Agreement, the December 1989 Agreement and the policies, rules, regulations and resolutions enacted, adopted and/or promulgated in accordance therewith violate the Commerce Clause of the United States Constitution and are unconstitutional and void;

3. Ordering Defendants to pay damages in an amount necessary to compensate Plaintiffs for any economic loss they have suffered, together with interest and costs;

4. Awarding Plaintiffs reasonable attorneys' fees, together with interest and costs;

5. Retaining jurisdiction to supervise the implementation of the Court's order; and

6. Awarding such other relief as the Court deems just and proper.

Dated: April 14, 1995 YOUNG, STOCKLI & ROWE

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[Title Omitted in Printing]

ANSWER

COMES NOW DEFENDANT Oneida-Herkimer Solid Waste Management Authority (hereinafter referred to as "the Authority"), by and through attorneys RAYHILL & RAYHILL, and for an answer to plaintiffs' complaint alleges as follows:

The Authority DENIES each and every allegation not specifically admitted herein.

1. The Authority ADMITS that plaintiffs have named 42 U.S.C. § 1983, 28 U.S.C. § 2201, et seq, and Article I, Section 8, Clause 3 of the United States Constitution as the grounds for this lawsuit, but the Authority DENIES that a claim has been presented under any of plaintiffs' named theories and further DENIES that plaintiff is entitled to any relief requested therein.

2. The Authority DENIES that this court has subject matter jurisdiction.

3. The Authority ADMITS that if this court had subject matter jurisdiction, venue would be proper.

4-10. The Authority is without sufficient information with which to either admit or deny the allegations contained in paragraphs 4 through 10 of plaintiffs' complaint and therefore DENIES the same.

11-13. The Authority ADMITS the allegations contained in paragraphs 11-13 of plaintiffs' complaint.

14 and 15. The Authority ADMITS the allegations of paragraphs 14 and 15 of plaintiffs' complaint.

16. The Authority ADMITS that it was granted certain powers and assigned certain duties by legislation enacted at Chapter 43-A, Title 13-FF of the New York State Public Authorities Law (hereinafter referred to as the "Act"), but refers the court to the legislation for the court's determination of those powers and duties. To the extent plaintiffs' generalizations are at odds with the Act, the allegations of paragraph 16 are DENIED.

17. The Authority ADMITS it was granted certain powers and assigned certain duties in the Act, but refers the court to the Act for the court's determination of those powers and duties. To the extent plaintiffs' characterizations are at odds with the substance of the Act, plaintiffs' allegations of paragraph 17 are DENIED.

18. The Authority ADMITS it was granted certain powers and assigned certain duties in the Act, but refers the court to the Act for the court's determination of those powers and duties. To the extent plaintiffs' characterizations are at odds with the substance of the Act, plaintiffs' allegations of paragraph 18 are DENIED.

The Authority ADMITS the Act at §2049-ee(8) prohibits the Authority from receiving, collecting, treating or disposing of solid waste (other than recyclables) which are generated outside the Authority's area of operation.

19. The Authority ADMITS it was granted certain powers and assigned certain duties in the Act, but refers the court to the Act for the court's determination of those powers and duties. To the extent plaintiffs' characterizations are at odds with the substance of the Act, plaintiffs' allegations of paragraph 19 are DENIED.

20. The Authority ADMITS the allegations contained in paragraph 20 of the Complaint to the extent that the Counties

are authorized to adopt local laws, ordinances and regulations regarding collection and disposal of solid waste with provisions for enforcement and penalties, but refers the Court to the text of the Act for the nature and extent of such authority, and DENIES all other allegations of paragraph 20 of the Complaint contrary thereto.

21. The Authority ADMITS the allegations contained in paragraph 21 of the Complaint to the extent that the Counties are authorized to adopt local laws, ordinances and regulations regarding collection and disposal of solid waste with provisions for enforcement and penalties, but refers the court to the text of the Act for the nature and extent of such authority, and DENIES all other allegations of paragraph 21 of the Complaint contrary thereto.

22. The Authority ADMITS the allegations contained in paragraph 22 of the Complaint to the extent that the Counties may contract with the Authority with regard to the financial affairs of the Authority, but refers the Court to the text of the Act for the extent and purposes of such contracts, and DENIES all other allegations of paragraph 22 of the Complaint contrary thereto.

23-30. The Authority ADMITS it entered into a Solid Waste Management Agreement in May of 1989 (hereinafter referred to as the "May 1989 Agreement") with Oneida and Herkimer Counties with regard to management of solid waste generated within Oneida and Herkimer Counties and refers the court to the Act and the Agreement for the court's determination of the terms found therein. To the extent the plaintiffs' characterizations of the terms of the Act or the May 1989 Agreement differ from the actual terms, the plaintiffs' allegations of paragraphs 23-30 are DENIED.

31-34. The Authority ADMITS the existence of Local Law No. 1 of 1990 enacted by the Oneida County Legislature (hereinafter referred to as "the Oneida Law") and refers the court to such law for the court's interpretation of its terms.

To the extent plaintiffs' characterizations differ from the actual terms of the Oneida Law, the allegations of paragraphs 31-35 of plaintiffs' complaint are DENIED.

35. The Authority DENIES knowledge and information sufficient to admit or deny the allegations contained in paragraph 35 of the Complaint, and therefore DENIES the same.

36-42. The Authority ADMITS the existence of Local Law No. 1 of 1990 enacted by the Herkimer County Legislature (hereinafter referred to as "the Herkimer Law") and refers the court to such law for the court's interpretation of its terms. To the extent plaintiffs' characterizations differ from the actual terms of the Herkimer Law, the allegations of paragraphs 36-43 of plaintiffs' complaint are DENIED.

43. The Authority DENIES knowledge and information sufficient to admit or deny the allegations contained in paragraph 43 of the Complaint, and therefore DENIES the same.

44. The Authority ADMITS the allegations contained in paragraph 44 of plaintiffs' complaint.

45. The Authority ADMITS as much of paragraph 45 of the Complaint as allege that the Counties and the Authority entered into a second Solid Waste Management Agreement on or about December 28, 1989 and refers the Court to said contract for the meaning and effect thereof, and DENIES each and all allegations of said paragraph of the Complaint contrary thereto.

46. The Authority ADMITS as much of paragraph 46 of the Complaint as allege that the Counties and the Authority entered into a second Solid Waste Management Agreement on or about December 28, 1989 and refers the Court to said contract for the meaning and effect thereof, and DENIES each and all allegations of said paragraph of the Complaint contrary thereto.

47. The Authority ADMITS the allegations contained in paragraph 47 of the Complaint to the extent that the Authority has been vested with and/or delegated certain powers under the Local Laws of Oneida and Herkimer Counties, the May and December Agreements, and Title 13FF of the Public Authorities Law. The Court is referred to the text of said laws and Agreements for the substance of the Authority's powers. The Authority DENIES all allegations of paragraph 47 of the Complaint which allege or imply that the Authority has acted in an unlawful or ultra vires manner with respect to its lawfully authorized powers.

48. The Authority DENIES knowledge and information sufficient to admit or deny the allegations contained in paragraph 48 of the Complaint, and therefore DENIES the same.

49. The Authority ADMITS the allegations found in paragraph 49 of plaintiffs' complaint.

50. The Authority ADMITS the allegations contained in paragraph 50 of the Complaint to the extent that the Authority issued bonds in the amounts set forth at the times stated for the purposes set forth in the bond documents. The Court is referred to the bond documents for the specific uses of funds from each bond sale, and the Authority DENIES all allegations of paragraph 50 of the Complaint which are inconsistent with said documents.

51. The Authority ADMITS the allegations contained in paragraph 51 of the Complaint to the extent that the Authority issued bonds in the amounts set forth at the times stated for the purposes set forth in the bond documents. The Court is referred to the bond documents for the specific uses of funds from each bond sale, and the Authority DENIES all allegations of paragraph 51 of the Complaint which are inconsistent with said documents.

52. The Authority ADMITS the allegations contained in paragraph 52 of the Complaint to the extent that the Authority issued bonds in the amounts set forth at the times stated for the purposes set forth in the bond documents. The Court is referred to the bond documents for the specific uses of funds from each bond sale, and the Authority DENIES all allegations of paragraph 52 of the complaint which are inconsistent with said documents.

53. The Authority ADMITS the allegations of paragraph 53 of the complaint to the extent that the Authority owns and operates the compost facility and recycling center, owns the ERF and operates it as a transfer station, and operates the ash landfill.

54. The Authority ADMITS that it owns the transfer station and DENIES the remainder of the allegations of paragraph 54 of plaintiffs' complaint.

55. The Authority DENIES the allegations contained in paragraph 55 of the Complaint, but ADMITS that the Authority is vested with certain lawful authority and has provided certain facilities to the people of Oneida and Herkimer Counties for the disposal of certain materials according to law.

56. The Authority ADMITS the allegations in paragraph 56 of the Complaint to the extent that the Ash Landfill and Transfer Station accept solid waste and C & D debris but otherwise DENIES the allegations of paragraph 56 of the Complaint.

57. The Authority ADMITS the allegation entered in paragraph 57 of the Complaint to the extent that the Compost Facility accepts only green waste but otherwise DENIES the allegations of paragraph 57 of the Complaint.

58. The Authority ADMITS the allegations entered in paragraph 58 of the Complaint to the extent that the Recycling Center began operations in 1991 and accepts

household recyclables and recyclables from other establishments within the Counties; DENIES knowledge and information sufficient to admit or deny the allegations regarding recyclables allegedly received from plaintiffs; and otherwise DENIES all other allegations of paragraph 58 of the Complaint.

59. The Authority ADMITS the allegations in paragraph 59 to the extent the ERF was erected as an ERF in 1965, but the Authority DENIES the remainder of the allegations of paragraph 59.

60. The Authority ADMITS the allegations contained in paragraph 60 of the Complaint to the extent that the ERF is no longer used as an incinerator and is now used as a transfer station, but DENIES all other allegations of paragraph 60 of the Complaint.

61 and 62. The Authority ADMITS the allegations of paragraphs 61 and 62 of plaintiffs' complaint.

63. The Authority ADMITS the allegations contained in paragraph 63 of the Complaint to the extent that a contract between the Authority and Empire Sanitary Landfill of Taylor, PA, was awarded after public bidding in June of 1991, the terms of which speak for themselves, and DENIES all allegations of paragraph 63 of the Complaint contrary thereto.

64. The Authority ADMITS the allegations contained in paragraph 64 of the Complaint, to the extent that a contract amendment with Empire was executed in 1994, the terms of which speak for themselves, and DENIES all allegations of paragraph 64 of the Complaint contrary thereto.

65. The Authority ADMITS it is in the process of siting a landfill within the two-county area for the disposal of Oneida-Herkimer municipal solid waste, but DENIES all other allegations of paragraph 65 of plaintiffs' complaint.

66. The Authority ADMITS the allegations contained in paragraph 66 of the Complaint to the extent that certain cost estimates and projected tipping fees have been estimated based upon a number of assumptions set forth in the planning documents of the Authority, and refers the Court to the official records of the Authority for such estimates and projections, and otherwise DENIES all other allegations of paragraph 66 of the Complaint.

67 and 68. The Authority DENIES the allegations found in paragraphs 67 and 68 of plaintiffs' complaint.

69. The Authority ADMITS that all haulers must obtain a permit prior to collecting solid waste in the two county area.

The Authority ADMITS the plaintiffs have accurately stated the tipping fees, including penalties, for 1995.

The Authority DENIES all remaining allegations of paragraph 69 of plaintiffs' complaint.

70. The Authority DENIES the allegations of paragraph 70.

71. The Authority DENIES the allegations of paragraph 71. The holding of *Carbone v. Town of Clarkstown*, ___ U.S. ___, 114 S.Ct. 1667 (1994) is a matter for the court's construction.

72. The Authority DENIES the allegations of paragraph 72 of plaintiffs' complaint and further DENIES that *Carbone*, *supra*, has any application to the case at bar.

73. The Authority repeats and realleges paragraphs 1 through 72 herein as if fully set forth.

74. The Authority DENIES the allegations of paragraph 74 of plaintiffs' complaint.

75. The Authority DENIES the allegations of paragraph 75 of plaintiffs' complaint.

76. The Authority DENIES that anyone, in-state or out-of-state, is precluded from competing for plaintiffs' business.

77-79. The Authority is without information or belief with which to either admit or deny the allegations of paragraphs 77-79 and therefore DENIES the same.

80-83. The Authority DENIES the allegations of plaintiffs' complaint found in paragraphs 80-83.

84. The Authority is without information as to which regulation plaintiffs contend suffers license revocation for its infraction and therefore the Authority is without information with which to admit or deny the allegations. Accordingly, the allegations of paragraph 84 are DENIED.

85. The Authority DENIES knowledge and information sufficient to admit or deny the allegations contained in paragraph 85 of plaintiffs' complaint, and therefore DENIES the same.

86. The Authority DENIES the allegations of paragraph 86 of plaintiffs' complaint.

87. The Authority repeats and realleges paragraphs 1 through 86 herein as if fully set forth.

88. The Authority asserts that the allegations set out in paragraph 88 of plaintiffs' complaint, insofar as they reference and quote from a statute (42 U.S.C. § 1983) which speaks for itself, do not require admission, denial or other controversion. The Authority DENIES it has violated 42 U.S.C. § 1983 and further DENIES plaintiffs' have stated a cause of action under 42 U.S.C. § 1983.

89. Whether certain referenced matters constitute "statutes" within the meaning of 42 U.S.C. § 1983 is a matter for determination by this court. The Authority DENIES it has violated 42 U.S.C. § 1983.

90. Whether the Authority is a "person" as defined in 42 U.S.C. § 1983 is a matter for determination by this court. The Authority DENIES it has violated 42 U.S.C. § 1983.

91. Whether the policies, rules, regulations, and/or resolutions are "regulations and/or ordinances" within the meaning of 42 U.S.C. § 1983 is a matter for determination by this court. The Authority DENIES it has violated 42 U.S.C. § 1983.

92. The Authority DENIES the allegations of paragraph 92.

93. The Authority ADMITS 42 U.S.C. § 1988(b) authorizes awards of attorney fees in civil rights actions in certain situations. The Authority DENIES it has violated 42 U.S.C. § 1983, et seq. The authority DENIES that plaintiffs are entitled to an award of attorney fees or any other relief.

94 and 95. The Authority DENIES the allegations of paragraphs 94 and 95.

FIRST AFFIRMATIVE DEFENSE

96. In the early 1960s, Congress recognized that garbage was a problem of epic proportion. Congress also recognized that the volume of garbage of all sorts was expanding exponentially. In order to meet perceived present needs, and in an attempt to avert future disaster, Congress enacted the Solid Waste Disposal Act of 1965. Their efforts proved wholly unsatisfactory and, in 1976, Congress enacted the Resource Conservation and Recovery Act (RCRA) (42 U.S.C. Sections 6901 et. seq.). Congress again underestimated the size of the problem and sweeping amendments were implemented in 1984, 1988, and again in 1992.

RCRA establishes federal guidelines for the handling of solid waste. New York State's Solid Waste Management Plan (NYSWMP) was enacted in direct response to

Congress' enactment of RCRA and was an effort by the State Legislature to implement the RCRA mandates. On September 1, 1988, the Oneida-Herkimer Solid Waste Management Authority, a public benefit corporation, was created by the New York State Legislature and directed in its enabling laws to implement state and federal solid waste policy.

The Laws, Rules and Regulations under attack in this lawsuit are authorized and/or mandated under RCRA and the NYSWMP and the New York Environmental Conservation Law (ECL) and are enforced by the Federal Environmental Protection Agency and the New York State Department of Environmental Conservation. The policies and customs under attack in this lawsuit are the policies and customs of the Federal and State governments.

SECOND AFFIRMATIVE DEFENSE

97. The plaintiffs' complaint fails to state a claim upon which relief can be granted.

THIRD AFFIRMATIVE DEFENSE

98. The plaintiffs lack standing to assert the claims set forth in the complaint.

FOURTH AFFIRMATIVE DEFENSE

99. The complaint fails to present an actual case or controversy under the Declaratory Judgment Act and Article Three of the United States Constitution.

FIFTH AFFIRMATIVE DEFENSE

100. This court lacks subject matter jurisdiction.

SIXTH AFFIRMATIVE DEFENSE

101. Plaintiffs have failed to exhaust their administrative remedies.

SEVENTH AFFIRMATIVE DEFENSE

102. Plaintiffs have failed to allege connection with interstate commerce or interstate commerce injury sufficient to afford them commerce clause protection.

EIGHTH AFFIRMATIVE DEFENSE

103. All actions of the Authority are implemented under direct authorization of the Legislature of the State of New York and, accordingly, are protected by the 10th Amendment to the Constitution of the United States.

NINTH AFFIRMATIVE DEFENSE

104. The mandated duties of the Authority, to establish and operate a hierarchical solid waste management system, are intended and designed to achieve the important government functions of safe and responsible solid waste deposit and a reduction of the amount which is deposited. The Authority is not concerned with the protection of local markets for local businesses. The authority is not interested in preventing out-of-state competitors from entering the local solid waste collection market. In fact, should an out-of-state hauler seek to collect solid waste in the Oneida-Herkimer county area, all that hauler need do is seek the same permit all haulers must secure, local or otherwise. The Authority is intent on implementing federal and state law to see that the volume of solid waste is reduced, to see that what can be reused is reused, to see that what can be recycled is recycled, and to see that what can be recovered is recovered. The Authority is intent on the inspection of solid waste to see that toxic substances are not commingled with municipal solid waste. The Authority is intent on implementing and operating a comprehensive recycling program which covers substances from motor oil to paints and solvents — traditional toxic pollutants often dumped in or near groundwater sources. The Authority acts in accordance with and in compliance with the

Herkimer Law and the Oneida Law to protect the public health and promote a sound environment.

TENTH AFFIRMATIVE DEFENSE

105. The Authority and the two Counties are market participants in the disposal of solid waste and recyclables.

As a market participant, the Authority is not precluded under the commerce clause from designating where and how their solid waste will be managed. The Authority is not precluded by the commerce clause from ensuring that RCRA is complied with and future CERCLA liability is avoided. Because the Authority is participating in the market for the article of commerce as defined in this matter, the Authority is exempt from commerce clause scrutiny.

ELEVENTH AFFIRMATIVE DEFENSE

106. The Laws, Rules, Regulations, Policies and Practices of the Authority do not facially discriminate against interstate commerce.

TWELFTH AFFIRMATIVE DEFENSE

107. The Laws, Rules, Regulations, Policies and Practices of the Authority do not have a discriminatory effect upon interstate commerce.

THIRTEENTH AFFIRMATIVE DEFENSE

108. The Authority, through practice or policy, does not discriminate against interstate commerce.

Local interests are not protected over out-of-state interests. The Authority's practices and policies are not a form of economic protectionism. They do not benefit in-state collectors by burdening out-of-state collectors. No class of competitors is protected or harmed by Authority practice or policy on the basis of location or any other criteria.

The Authority and its practices and policies are designed and implemented to serve the local, state, and federal interests of reduction of waste volume and responsible and safe handling of municipal solid waste, to protect the public health and promote a sound environment.

FOURTEENTH AFFIRMATIVE DEFENSE

109. Pursuant to state and local laws all municipal solid waste handled and disposed by the Authority is properly within the dominion, control and possession of the general public and their representatives, the defendants.

FIFTEENTH AFFIRMATIVE DEFENSE

110. The plaintiffs are not entitled to relief due to laches.

SIXTEENTH AFFIRMATIVE DEFENSE

111. The claims asserted in the complaint are not ripe for adjudication.

SEVENTEENTH AFFIRMATIVE DEFENSE

112. The plaintiffs have waived their rights, if any, to relief.

EIGHTEENTH AFFIRMATIVE DEFENSE

113. The plaintiffs are estopped from seeking the relief they have requested.

NINETEENTH AFFIRMATIVE DEFENSE

114. The Laws, Rules, Regulations, policies and customs under attack in this lawsuit are designed to achieve the ends of reduction, reuse, recycling, and recovery. They are not designed to impede interstate commerce nor do they impede interstate commerce.

TWENTIETH AFFIRMATIVE DEFENSE

115. Plaintiffs have failed to join necessary and indispensable parties.

TWENTY-FIRST AFFIRMATIVE DEFENSE

116. Within Oneida and Herkimer Counties, the collection of municipal solid waste and recyclables is regulated by Oneida and Herkimer Counties and the Authority, under grant of power by the State of New York.

TWENTY-SECOND AFFIRMATIVE DEFENSE

117. All relevant actions of the Authority were and are local actions unrelated to interstate commerce and insufficient to implicate the Commerce Clause of the United States Constitution.

TWENTY-THIRD AFFIRMATIVE DEFENSE

118. All relevant actions of the Authority were and are authorized and protected by the Guaranty Clause of the United States Constitution.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

119. A Federal Court adjudicating a dormant Commerce Clause case stands vicariously in the shoes of Congress. Therefore, an adjudication by such a Court which invalidates the citizen-chosen method of managing local solid waste would result in a taking of the property of the Authority and its bondholders, without just compensation, and in violation of the Fifth Amendment to the United States Constitution.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

120. All relevant Laws, Rules and Regulations enacted and/or applied by the Authority serve a valuable local purpose which outweighs any incidental burden, if any, on interstate commerce.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

121. All relevant Laws, Rules and Regulations enacted and/or applied by the Authority do not facially discriminate against interstate commerce and serve a valuable local

purpose which could not be served in any other way and therefore any burden, if any, placed upon interstate commerce is justified.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

122. The Laws, Rules and Regulations enacted and/or applied by the Authority which are the subject of this Complaint were authorized by Act of Congress and are not repugnant to the Commerce Clause of the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, defendant demands judgment against plaintiffs dismissing plaintiffs' Complaint, together with costs and disbursements of this action, including attorneys fees, and such other relief as this Court deems just and equitable.

Dated: June 14, 1995

RAYHILL & RAYHILL
By: /s/ Philip A. Rayhill
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WASTE DISPOSAL AGREEMENT

BETWEEN

EMPIRE SANITARY LANDFILL, INC.
U.S. SYSTEMS CORPORATION

AND

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY

Dated as of June 28, 1991

WASTE DISPOSAL AGREEMENT

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SCHEDULE I

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DISPOSAL AGREEMENT

THIS WASTE DISPOSAL AGREEMENT (the "Agreement") made and entered into as of the 28 day of June, 1991, by and between U.S. Systems Corporation, 314 Main Street, Suite 23, Great Barrington, Massachusetts (U.S.S.), Empire Sanitary Landfill, Inc., P. O. Box 22, Taylor, Pennsylvania (Empire), and the Oneida-Herkimer Solid Waste Management Authority, 311 Turner Street, Suite 401, Utica, New York (the "Authority").

RECITALS:

WHEREAS, the Authority is authorized by Section 2049-ee of the Oneida-Herkimer Solid Waste Management Authority Act, N.Y. Pub. Auth. Law, Article VIII, Title thirteen-FF (1987) (the "Act") to collect, receive, extract, transport, dispose of, sell, store, convey, recycle, and deal with, in any lawful manner and way, Solid Waste and any products or by-products thereof, on such terms and in such manner as the Authority may deem proper; and

WHEREAS, Empire is the owner and operator of one or more Solid Waste disposal facilities with present or future capacity to dispose of Authority Waste; and

WHEREAS, the Authority and Empire desire to enter into an agreement whereby the Authority will deliver or cause to be delivered Authority Waste to a transfer station, and Empire will dispose of such Authority Waste at a Solid Waste disposal facility authorized to operate under all applicable federal, State and local laws; and

WHEREAS, the Authority and Empire have entered into a separate agreement (the construction agreement) whereby Empire has agreed to design and manage construction of a Transfer Station where Authority Waste will be delivered for inspection and loading on trucks for transportation to Empire's landfill located in Taylor, Pennsylvania; and

WHEREAS, USS utilizing its knowledge and expertise with respect to regional disposal requirements will consult with Empire during the design phase and act as compliance inspector during construction of the Transfer Station and perform services as waste management inspector of waste to be delivered to the facility; and

WHEREAS, the Authority has agreed to pay Empire for services performed by Empire and USS in accordance with the terms of this Agreement;

NOW, THEREFORE, in consideration of the premises and of the mutual obligations undertaken herein, the Parties hereby agree as follows:

ARTICLE I - DEFINITIONS

Section 1.01 Definitions. For purposes of this Agreement, the following words and phrases shall be given the respective interpretations and meanings set forth below.

"Alternate Disposal Site" means any duly licensed or permitted alternate disposal facility designated by Empire and approved by the Authority pursuant to Section 3.06.

"Authority Hauler(s)" means any Person permitted by the Authority to deliver Authority Waste to the Transfer Station on behalf of the Authority.

"Authority Surcharge" means the amount per Ton, as said amount may from time to time be revised by the Authority, to be invoiced and billed to Authority Haulers(s) for Solid Waste delivered. to the Transfer Station.

"Authority Waste" means Solid Waste generated or originating in the Counties, net of Recyclables, Hazardous Waste, composted Municipal Solid Waste, waste burned in the Authority's Energy Recovery Facility and waste directed into experimental projects which explore new technology for disposal of solid waste.

"Billing Period" means each calendar month in each Billing Year.

"Billing Year" means each twelve month period commencing on January 1, 1992 and ending on the last day of the twelfth full month thereafter; provided, however, that the first Billing Year shall commence on the first day of the first month following the Commencement Date.

"Business Day" means each Monday, Tuesday, Wednesday, Thursday, Friday and Saturday which is not a Legal Holiday.

"Change in Law" means either (a) the enactment, adoption, promulgation, modification or repeal, after the Contract Date, of any federal, State, County or other local law, ordinance, code, rule or regulation or other similar legislation which establishes requirements affecting the removal, transport and disposal of the Authority Waste more burdensome than the most stringent requirements in effect on the Contract Date, or (b) the imposition, after the Contract Date, of any material conditions in the issuance or renewal of any official permit, license or approval necessary for operation of the Transfer Station or the Facility, which reduces the amount of Authority Waste which may be received at the Transfer Station or the Facility, or which prohibits the receipt of any amount of the Authority Waste at the Transfer Station or the Facility, by establishing requirements with respect to the operation or maintenance of the Transfer Station or the Facility, or with respect to the disposal of Authority Waste, which are more burdensome than the most stringent requirements in effect on the Contract Date. In no event shall a change in federal, State or local tax law, other than a law imposing a fee on the importation of waste into a State, be considered a Change In Law.

"Commencement Date" means the date on which the Authority commences, or causes to be commenced, deliveries of Authority Waste to the Transfer Station, and

Empire is obligated to dispose of such waste, which date shall be established pursuant to the provisions of Section 3.02(a).

"Contract Date" means the date of execution of this Agreement.

"Contractor Fault" means the unexcused nonperformance by either U. S. Systems or Empire Sanitary Landfill, Inc. severally or the negligent or willful act or omission of an agent or employee of either of them under this Agreement.

"Cost Substantiation" means, with respect to any Direct Cost, a certificate, accompanied by supporting documentation, signed by an authorized representative of Empire or the Authority, which certificate shall be provided no later than ninety (90) days after the date on which Empire or the Authority paid such amount, stating such Party's reason for incurring such Direct Cost, the amount of such Direct Cost, and the event or Section of this Agreement giving rise to such Party's right to incur and be reimbursed for any such Direct Cost and that such Direct Cost is at a competitive price for the service or materials supplied.

"Counties" means the Counties of Oneida and Herkimer, New York.

"DEC" means the New York State Department of Environmental Conservation and its successor.

"D.E.R." means the Pennsylvania Department of Environmental Resources and its successors.

"Direct Costs" means, in connection with any work performed by or on behalf of Empire or the Authority by its agents or employees, or any cost or expense incurred by either Empire or the Authority, for which such Party is entitled to reimbursement pursuant to the terms of this Agreement, the sum of (i) the costs of payroll consisting of compensation and fringe benefits, including vacation, sick leave, holidays, retirement, Worker's Compensation

Insurance, federal and State unemployment taxes and all medical and insurance benefits, times 1.10, plus (ii) the costs of materials and supplies purchased in connection with any such work, plus (iii) the costs of travel and subsistence incurred by any employee of such Party, plus (iv) the costs of any payments to subcontractors in connection with such work. Verification of any Direct Cost incurred by Empire or the Authority shall be provided, to the extent of Cost Substantiation, within ninety (90) days of the payment of such amount by the Party seeking reimbursement therefor.

"Disposal Fee" means the cost per Ton payable by the Authority to Empire for disposal of Authority Waste loaded on Transfer Trailers at the Transfer Station for delivery to the Facility.

"Disposal Fee Increase Limitation" means, after the Contract Date, a cumulative increase in the Disposal Fee due to Uncontrollable Circumstances in excess of ten dollars ($10.00) per Ton.

"Empire" means Empire Sanitary Landfill, Inc. incorporated under the laws of the State of Pennsylvania and. authorized to do business in the State of Pennsylvania and the State of New York.

"Environmental Conditions" means the discharge, leaching, disposal or release into the environment of any Solid Waste, Hazardous Waste, hazardous or toxic substance, or contaminant.

"Event of Defaults" means any one or more of those events described in Sections 8.03 and 8.04 hereof.

"Facility" means that certain landfill of Empire located in Taylor, Pennsylvania described in Schedule 1 hereto, which is fully authorized to operate under all applicable federal, State and local laws, and which is suitable for utilization by Empire to dispose of Authority Waste.

"Hazardous Waste" means any material, substance or waste which, as of the Contract Date and by reason of its composition or characteristic, is (a) toxic or hazardous as defined in the Solid Waste Disposal Act, 42 U.S.C. Section 6901 et seq., section 6(e) of the Toxic Substances Control Act, 15 U.S.C. Section 2605(e) or the New York Environmental Conservation Law, Section 27-0701-0103, as any such provisions are replaced or amended, and regulations promulgated and finalized thereunder or (b) special nuclear material, source material, or by-product material within the Atomic Energy Act of 1954, as amended. If any governmental agency or unit now or hereafter having appropriate jurisdiction shall determine that materials, substances, or wastes which were not, as of the Contract Date, considered Hazardous Waste, then such substances shall be Hazardous Waste for purposes of this Agreement as of the effective date of any such determination.

"Legal Holiday" means New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and. Christmas Day.

"Party" or "Parties" means Empire, U.S.S. or the Authority, as the context requires.

"Person" means any individual, corporation, partnership, joint venture, association, joint-stock company, trust, unincorporated organization, or government or any agency or political subdivision thereof.

"Receiving Time" means the period of operation of the Transfer Station consisting of _____ hours from _____ until _____ on each Business Day.

"Schedule" means any exhibit or schedule attached. hereto and incorporated in this Agreement, unless otherwise expressly indicated by the terms of this Agreement.

"Section" means a section of this Agreement.

"Solid Waste" has the meaning specified in 6 NYCRR Part 360-1.2(a), as amended or replaced and DNR Regulations. Solid Waste shall also mean residual waste sludge, and construction and demolition waste as defined in DNR Regulations. The Authority shall only include residual waste, sludge and construction and demolition waste as so defined, in the Authority Waste delivered to the Transfer Station upon 180 days prior written notice to Empire.

"Ton" means two thousand (2,000) pounds.

"Transfer Station" means a solid waste transfer facility where Authority Waste will be delivered by Authority haulers to Empire and where Empire will load Authority Waste on transfer trailers for shipment to Empire's facility for disposal.

"Uncontrollable Circumstance" means any act, event or condition, other than a labor strike, that has had, or may reasonably be expected to have, a direct material adverse effect on the rights or the obligations of a Party under this Agreement, or a direct material adverse effect on the operation of the Transfer Station or the Facility, or on the delivery of Authority Waste to the Transfer Station or the Facility, if such act, event or condition is beyond the reasonable control of the Party relying thereon as justification for not performing an obligation or complying with any condition required of such Party under this Agreement. Such acts or events shall include, but shall not be limited to, the following:

(a) an act of God (except normal weather conditions for the geographic area of the Facility), hurricanes, tornados, epidemic, landslide, lightning, earthquake, flood, fire or explosion or similar occurrence; or an act of the public enemy, war, blockade, insurrection, riot, general unrest, or restraint of government and people, civil disturbance or similar occurrence;

(b) the order, or Injunction and/or judgment of any federal, State or local court, administrative agency or governmental body with jurisdiction over the performance of a Party's obligations under this Agreement; excepting decisions interpreting federal, State and local tax laws; provided that such order or judgment shall not be the result of the negligent or willful action or inaction of the Party relying thereon and neither the contesting in good faith of any such order or judgment nor the failure to so contest shall be construed as a willful or negligent action or inaction of such Party; and

(c) a Change in Law including any change in law which permits the State of Pennsylvania to impose import fees on Authority Waste delivered to the Facility.

(d) suspension, termination or interruption of utilities, water and sewer lines and power transmission lines to the Transfer Station or the Facility (for reasons other than Empire's Fault) which are required for and essential to the operation of the Transfer Station or the Facility.

(e) extraordinary increases in the wholesale price of the resin used to fabricate the liner pads installed after January 1, 1993 at the facility.

"USS" means U.S. Systems Corporation, a corporation organized under the laws of the Commonwealth of Massachusetts and authorized to do business in the Commonwealth of Massachusetts and the State of New York.

"Week" means a period commencing Sunday at 12:01. a.m. and ending on midnight of the following Saturday.

Section 1.02 Terms Generally. Whenever the context may require, any pronoun shall include the corresponding masculine, feminine and neuter forms. The words "include", "includes" and "including" shall be deemed to be followed by the phrase "without limitation", except as the context may otherwise require. The words "agree", "agreement",

"approval and consent" shall be deemed to be followed by the phrase "which shall not be unreasonably withheld or unduly delayed" except as the context may otherwise require.

Section 1.03 Notices Generally. Unless specifically provided elsewhere in this Agreement, at least fifteen (15) days prior written notice shall be required to be given by one Party to the other Party of any breach of this Agreement by the other Party hereto or failure to fulfill any requirement of this Agreement by a Party, in order to allow the Party receiving such notice to cure any such breach or to allow such Party time to prepare for, question or contest the fact that any such requirement of this Agreement has not been fulfilled.

ARTICLE II- CONDITIONS PRECEDENT

Section 2.01 General. All, rights, obligations and liabilities of the parties hereunder shall be subject to the satisfaction of each of the respective conditions precedent set forth in Sections 2.02 and 2.03 on or before the Commencement Date.

Section 2.02 Conditions to Authority Oblations.

(a) Empire and USS shall each have delivered to the Authority a certificate of an authorized officer of Empire and USS respectively, dated as of the Contract Date, to the effect that each of the representations of Empire and USS set forth in Sections 10.03 and 10.04 are true and correct as if made on such date and opinions of counsel to Empire and USS, in customary form and acceptable to the Authority to the effect set forth in clauses (a) through (d) of Sections 10.03 and 10.04;

(b) all applicable permits, licenses and authorizations necessary for Empire's disposal of Authority Waste at the Facility shall be in full force and effect;

(c) The Authority shall have received permits from D.E.C. allowing the construction and operation of the Transfer Station;

(d) Empire shall have filed or caused to be filed all necessary tariffs and obtained all applicable permits for transporting Authority waste to the facility;

(e) The Authority and/or municipalities in the Counties shall have procured or otherwise secured the services of Authority Haulers which, in the determination of the Authority, are sufficient to collect, transport and deliver all Authority Waste to the Transfer Station for disposal;

(f) no action, suit, proceeding or official investigation shall have been overtly threatened or publicly announced or commenced by any Person or federal, State or local governmental authority or agency other than the Authority in any federal, State or local court, that seeks to enjoin, assess civil or criminal penalties against, assess civil damages against or obtain any judgment, order or consent decree with respect to the Authority, Empire or USS as a result of Empire's or USS's participation or intended participation in any transaction contemplated by this Agreement; provided, however, that any such action, suit, proceeding or investigation would, if adversely determined, materially affect this Agreement, or the performance by the Parties of their respective obligations hereunder or the transactions contemplated hereby; and provided further, that this paragraph 2.02(f) shall, without limitation, apply to any action, suit, proceeding or official investigation which is criminal in nature or which challenges the validity, binding effect or enforceability of this Agreement; and. provided further that the existence or threat of any action, suit or proceeding initiated by any person not a governmental agency that has been interposed for purposes of delay or hindrance of Authority programs and which is apparently frivolous shall not be an excuse for nonperformance of the

Authority's obligations hereunder. In the event a party, who is the target of any litigation or other proceeding, provides the other parties with an indemnification or other assurance which is satisfactory to them, then the subject litigation or proceeding shall not interfere with the performance of this Agreement.

(g) no change shall have occurred after the Contract Date in any applicable federal, State or local law, or any applicable federal, state or local rule, regulation or ordinance thereunder, or in the interpretation thereof by any applicable regulatory authority, that would make the execution or delivery by the Authority, Empire or USS of this Agreement, or would make compliance by the Authority, Empire or USS with the terms and conditions of this Agreement or the consummation by the Authority, Empire or USS of the transactions contemplated hereby, a violation of such law, rule, regulation or ordinance;

(h) Empire and USS shall each have submitted evidence, dated as of the Commencement Date, that there has been no material adverse change in their financial condition since the Contract Date; and

(i) Empire and USS shall each have delivered to the Authority certificates of insurance with respect to coverages which are satisfactory to the Authority

(j) Empire shall have furnished to the Authority the performance bond required under Section 10.06 and shall have deposited $350,000 in the joint account required under Section 9.03(b).

(k) Empire shall have designated an Alternate Disposal Site approved by the Authority under Section 3.06 and shall have furnished to the Authority (1) a copy of the contract or other documents satisfactory to the Authority incorporating Empire's arrangements for disposal of Authority Waste at the Alternate Disposal Site and (2) evidence satisfactory to the

Authority that all applicable permits, licenses and, authorizations necessary for Empire's disposal of Authority Waste at the Alternate Disposal Site are in full force and effect.

Section 2.03 Conditions to Obligations of Empire and USS.

(a) The Authority shall have delivered to both Empire and USS a certificate of the Authority, dated as of the Contract Date, to the effect that each of the representations of the Authority set forth in Section 10.02 are true and correct as if made on such date and an opinion of counsel to the Authority, in customary form, to the effect set forth in clauses (a) through (d) of Section 10.02;

(b) no action, suit, proceeding or official investigation shall have been overtly threatened or publicly announced or commenced by any Person or federal, state or local governmental authority or agency other than the Authority in any federal, state or local court, that seeks to enjoin, assess civil or criminal penalties against, assess civil damages against or obtain any judgment, order or consent decree with respect to the Authority, Empire or USS as a result of the Authority's participation or intended participation in any transaction contemplated hereby; provided, however, that any such action, suit, proceeding or investigation would, if adversely determined, materially affect this Agreement, or the performance by the Parties of their respective obligations hereunder or the transactions contemplated hereby; and

(c) no change shall have occurred after the Contract Date in any applicable federal, state or local law, or any applicable federal, state or local rule, regulation or ordinance thereunder, or in the interpretation thereof by any applicable regulatory authority that would make the execution or delivery by the Authority, Empire or USS of this Agreement, or would make compliance by the Authority; Empire or USS with the terms and conditions of this Agreement or the

consummation by the Authority, Empire or USS of the transactions contemplated hereby, a violation of such law, rule, regulation or ordinance.

Section 2.04 Satisfaction of Conditions Precedent.

(a) The Parties shall exercise good faith and due diligence in satisfying the Conditions Precedent set forth in this Article II and each Party shall give prompt notice to each of the other Parties when the foregoing conditions precedent to its obligation have been respectively satisfied or waived in writing by the Party whose obligation is conditioned thereon. If all of the said conditions precedent are not so satisfied or are not waived by a Party whose obligation is conditioned thereon on or before the date specified in Section 3-02(a) hereof as the Commencement Date, or such later date as the Authority may elect, then any other Party may, by-notice in writing to each of the other parties, terminate as of the date of the notice this Agreement with the party whose conditions precedent have not been satisfied or waived. No Party shall be relieved of its obligations hereunder by the failure to satisfy any condition precedent to the extent that the satisfaction of such condition is within such Party's control.

(b) Empire, USS and the Authority shall each provide executed acknowledgements to each of the other Parties that the conditions precedent to their respective obligations under this Agreement have been met immediately upon the satisfaction or waiver of such conditions precedent.

ARTICLE III - DELIVERY AND DISPOSAL OF SOLID WASTE

Section 3.01 Overall Responsibilities.

(a) The Authority shall be responsible for and shall deliver, or cause to be delivered, Authority Waste to the Transfer Station. The Parties agree and understand that the inadvertent and/or periodic delivery of non-Authority Waste shall not constitute a breach of this Agreement by the

Authority; provided, however, that the Authority shall use all reasonable efforts to deliver, or cause to be delivered, only Authority Waste to the Transfer Station.

(b) Empire shall accept such waste at the Transfer Station from collection vehicles which will deposit the waste on the tipping floor of the Transfer Station.

(c) The Authority shall collect the disposal fee and Authority surcharge described in Article IV for each load deposited by collection vehicles at the Transfer Station.

(d) USS shall inspect waste to be delivered to the facility and shall identify any waste other then Authority waste which can be rejected under paragraph 3.04.

(e) Empire shall load waste into open top transfer trailers and transport the loaded transfer trailers to the facility.

(f) Empire will unload the transfer trailers at the facility and dispose of Authority waste at the facility.

(g) Empire and USS shall obtain and maintain all necessary licenses and permits In order to enable them to perform their obligations under this Section 3.01 and elsewhere in this Agreement.

Section 3.02 Commencement Date; Notice of Site Chance; Receiving Time.

(a) Provided that the conditions precedent set forth in Article II have been met, the Commencement Date shall be December 1, 1991. If the conditions precedent are not met on or before such date, and the Authority elects to extend the date by which the conditions precedent must be met pursuant to Section 2.04, the Commencement Date shall be the 14th day (unless such 14th day is not a Business Day in which case the applicable day shall be the first Business Day following such 14th day) following the date on which the conditions precedent are met.

(b) Empire shall notify the Authority as soon as possible of its expected use of the Alternate Disposal Site.

(c) Empire shall keep the Facility open for receiving Authority Waste during the Receiving Time, excluding Legal Holidays. Subject to applicable State regulations and any permit issued thereunder, Empire may receive Authority Waste at the Facility at such additional times as Empire and the Authority may agree.

Section 3.03 Weighing of Solid Waste; Weigh Scale Records.

(a) The Authority shall operate N.Y.S. certified weigh scales located in the vicinity of the Transfer Station and maintain the weigh scale records, for the purpose of determining the total Tons of Solid Waste loaded on Transfer trailers leaving the Transfer Station. Empire shall have the right to inspect weigh scale records at any time during normal business hours. At the close of each business day a copy of weigh scale records for the day's activity shall be delivered to Empire by the Authority. Disputes with respect to the occurrence of weigh scale records shall be resolved pursuant to the provisions of Article VIII.

Section 3.04 Rejection Rights at the Transfer Station. USS shall have the right to reject deliveries by or on behalf of the Authority of:

(a) Any material other than Authority Waste;

(b) Authority Waste delivered at other than the Receiving Time;

(c) Authority Waste which cannot be received at the Transfer Station due to an Uncontrollable Circumstance; and

Disputes with respect to whether Authority Waste has been properly rejected shall be resolved pursuant to the provisions of Article VIII.

Section 3.05 Unauthorized Rejections.

(a) If USS rejects Authority Waste delivered to the Transfer Station for any reason other than those set forth in Section 3.04, the Authority shall not be required to pay a Disposal Fee to Empire with respect to such Authority Waste, and USS shall be obligated to pay to the Authority for its Direct Costs incurred, to the extent of Cost Substantiation, for the total of the transportation and disposal charges per Ton incurred by the Authority which are in excess of the Disposal Fee for each such Ton.

Section 3.06 Alternate Disposal Site

Empire shall designate subject to approval by the Authority an Alternate Disposal Site during periods in which Empire is unable to accept Authority waste at the facility. Empire shall enter into such arrangements as may be necessary for disposal by Empire of Authority Waste at such Alternate Disposal Site at no additional cost to the Authority and shall furnish to the Authority copies of the contract or other documents in form and substance satisfactory to the Authority incorporating Empire's arrangements for disposal of Authority Waste at the Alternate Disposal Site. On or before the Commencement Date Empire shall furnish evidence satisfactory to the Authority that all applicable permits, licenses and authorizations necessary for Empire's disposal of Authority Waste at the Alternate Disposal Site are in full force and effect.

ARTICLE IV – DISPOSAL FEE

Section 4.01 Disposal Fee.

(a) Collection. The Authority shall pay the Disposal Fee to Empire by the fifteenth day following the receipt by the Authority of Empire's statement for the Billing Period; provided, however, that if the fifteenth day shall be a Sunday or Legal Holiday, payment shall be made to Empire by the first immediately succeeding Business Day.

Empire shall provide the Authority with a statement together with each request for payment pertinent to such Billing Period. The statement shall set forth the number of Tons of Authority Waste and other Solid Waste loaded on Transfer trailers at the Transfer Station and the Disposal Fee due Empire.

(b) Fee. For any Billing Period, the Disposal Fee to be collected by the Authority from Authority Haulers for the disposal of Authority Waste shall be as follows:

1992	56.55 per ton of Authority Waste loaded on Transfer Trailers
1993	56.55 per ton
1994	56.55 per ton
1995	63.50 per ton
1996	71.31 per ton

(c) The fees listed in Section 4.01(b) are inclusive of all fees for services rendered by Empire and USS under this agreement except that Empire and USS shall agree as to the terms of compensation between them. The Authority shall incur no liability to USS for payment of USS's fees and USS hereby waives any claim against the Authority for any fees for services performed by USS under this contact and agrees that it will look solely to Empire for payment for its services.

Section 4.02 Adjustment to Disposal Fee for Uncontrollable Circumstance.

(a) Subject to Article VII if Empire incurs Direct Costs which are attributable to an Uncontrollable Circumstance, then the Disposal Fee shall be increased by the amount per Ton directly attributable to such Direct Costs, which increase shall be determined in accordance with subsection (b) hereof.

(b) Upon an event described in subsection (a), the increase per Ton in the Disposal Fee shall be determine as follows:

(i) Empire shall deliver to the Authority operating data for the three-year period which precedes the occurrence of the applicable Uncontrollable Circumstance (or if Empire has an operating history of less than three years preceding the Uncontrollable Circumstance, then Empire shall deliver the appropriate data for such lesser period).

(ii) Empire shall deliver to the Authority such data as may be requested by the Authority to enable it to determine the actual cost increase per Ton that would not have been incurred by Empire but for the occurrence of the Uncontrollable Circumstance. No allowance shall be made for profit of Empire.

(iii) The Authority shall determine the increase per Ton on the operating costs of Empire which is attributable to the Direct Costs incurred as a result of the Uncontrollable Circumstance. The amount so determined shall be added to the Disposal Fee.

ARTICLE V - OPERATION AND MAINTENANCE OF TRANSFER STATION

Section 5.01 Design and Construction of Transfer Station

(a) Project Description. Empire shall design and manage construction of a solid waste transfer station abutting the Materials Recovery Facility owned by the Authority. The Transfer Station shall be owned by the Authority and its operation permitted by D.E.C. in the name of the Authority. Empire shall operate the station pursuant to the terms of this contract. Empire's obligations to design and manage construction of the Transfer Station shall be governed by the terms of a separate agreement between Empire and the Authority.

(b) Role of U.S. Systems. U.S. Systems shall consult with Empire concerning compliance of plans and specifications with the terms of the Construction Permit. In no event shall USS be responsible for or obliged to provide supervision of the construction of the transfer station.

5.02 Transfer Station Operations

(a) Weighing of Transfer Trailers. In accordance with Section 3.03 the Authority shall cause each loaded transfer trailer to be weighed on New York State certified scales before departure from the Transfer Station to determine the tonnage of waste to be delivered to the Facility. Scales for weighing the vehicles shall be provided and operated by the Authority at a location to be chosen by the Authority in the vicinity of the Transfer Station.

(b) Discharge and inspection of Waste. After delivery of waste to the Transfer Station U.S. Systems shall inspect and identify Authority Waste to be delivered to the Facility. Unacceptable Waste shall be reloaded on the collection vehicle which deposited such material on the tipping floor.

(c) Loading of Waste. Empire shall collect Authority Waste from the tipping floor of the Transfer Station and load it on walking floor transfer trailers for shipment to the facility. Transfer trailers shall be fully tarped before departure to the facility.

(d) Staging Area. Empire shall have the use of a staging area to allow temporary parking of transfer trailers prior to departure for the facility and after their return.

(e) Transport of Trailers. Empire will transport or cause to be transported all loaded transfer trailers to the facility and empty trailers back to the Transfer Station. Trailers will be dedicated to the performance of Empire's obligations under this contract.

(f) Equipment. The Authority shall procure and maintain at its expense a D-6 Dozer or equivalent, two rubber tire front

end loaders and a knuckle boom crane. This equipment shall be used and operated by Empire in accordance with sound industrial practice at the Transfer Station to process and load Authority Waste on the Transfer trailers. Empire shall perform routine inspections of said equipment in order to advise the Authority of maintenance and repair requirements on a timely basis. Empire shall procure, maintain and operate at its expense the required number of walking floor transfer trailers for transportation of Authority Waste to the Facility.

(g) Staffing of Transfer Station. USS shall staff the transfer station with a qualified waste inspector.

(h) Utilities. Electricity, gas and water used at the transfer station shall be separately metered and billed in the name of the Authority which shall be responsible for the payment of all invoices for these services.

(i) Office. The Authority will at its own cost and expense provide a partitioned area of the transfer station for use by Empire and USS as office space.

Section 5.03 Use of Transfer Station

(a) Empire and USS may use the Transfer Station for the performance of their respective duties under this agreement. If not previously terminated under Article IX, their use of the transfer station shall terminate at the end of the term of this agreement. Thereafter, if continued operation of the Transfer Station by Empire and/or USS is requested by the Authority, the parties shall enter into a new contract that shall incorporate such provisions as may then be required by applicable laws and regulations.

(b) Title to the transfer station shall remain in the Authority. Title to parts replaced by the Empire in carrying out its normal maintenance responsibilities under Section 5.04 shall pass to and vest in the Authority upon completion of their installation in the Transfer Station.

(c) Empire and USS shall keep the Transfer Station free and clear of all liens and encumbrances and, except as otherwise authorized by this contract, shall not remove any part thereof or permit the use by others of any part thereof except as may be permitted by the Authority under Section 10.09 "Subcontracts".

(d) Empire and USS shall not construct or install, any fixed improvement or structural alterations in the Transfer Station without the advance written approval of the Authority. Fixed improvement or structural alterations as used herein means any alteration or improvement in the nature of the building or other real property that, after completion, cannot be removed without substantial loses of value or damage to the premises.

(e) The Authority and any persons designated by it shall, at all times have access to the Transfer Station for the performance of Authority functions on a non-interference basis.

(f) The Authority makes no warranty express or implied regarding the condition or fitness for use or operation of the Transfer Station.

Section 5.04 Maintenance of Transfer Station

(a) Empire shall protect, preserve, and clean the Transfer Station.

(b) As soon as practicable after the completion of the construction of the Transfer Station, Empire shall submit to the Authority in writing a proposed cleaning program. If the Authority agrees to the proposed program it shall become the normal maintenance program of Empire. At the end of the term of this Agreement Empire shall leave the Transfer Station in good order and condition.

(c) The Authority shall be responsible for snow and ice removal, grounds maintenance, mud and dust control and removal of litter outside the Transfer Station.

(d) The Authority shall be responsible for payment of leachate disposal costs.

ARTICLE VI - INDEMNIFICATION

Section 6.01 Indemnification.

(a) Empire agrees that it shall protect, indemnify, and hold harmless the Authority and its respective members, employees and agents, (the "Authority Indemnified Parties") from and against all liabilities, actions, damages, claims, demands, judgments, losses, costs, expenses, suits, or actions and reasonable attorneys' fees, and shall defend the Authority Indemnified Parties in any suit, including appeals, for personal injury to, or death of, any person or persons, or for loss or damage to property arising out of the acts or omissions of Empire in the performance (or nonperformance) of the Empire's obligations under this Agreement. Empire further agrees that the Authority shall not be liable solely as a result of entering into this Agreement or authorizing the disposal of Authority Waste at the Facility or Alternate Disposal Site, for any claims, damages, or loss arising from Environmental Conditions at the Facility or Alternate Disposal Site, and that Empire will indemnify, defend and hold harmless Authority Indemnified Parties against and from all liabilities, obligations, damages, penalties, costs and expenses up to the limits of Empire's pollution liability insurance which shall not be less than $15,000,000.00 of every nature which may be imposed on or incurred by or asserted against them or any of them in connection with the Environmental Conditions existing on or at the Facility or Alternate Disposal Site. Empire is not, however, required to protect indemnify or hold harmless any Authority Indemnified Party for loss or claim resulting from performance (or nonperformance) of the Authority's obligations under this Agreement or the negligence or willful misconduct of any Authority Indemnified Party. Empire's aforesaid indemnity is for the exclusive benefit of Authority

Indemnified Parties and in no event shall such indemnity inure to the benefit of any third Person.

(1) Municipalities. Empire further agrees not to assert any claim damages or seek contribution from any Municipality in the counties arising out of the disposal or arranging for the disposal of Solid Waste at the Facility, or arising from Environmental Conditions at Empire's Facility.

(b) USS agrees that it shall protect, indemnify, and hold harmless the Authority and its respective members, employees and agents (the "Authority Indemnified Parties") from and against all liabilities, actions, damages, claims, demands, judgments, losses, costs, expenses, suits, or actions and reasonable attorneys' fees, and shall defend the Authority Indemnified Parties in any suit, including appeals, for personal injury to, or death of, any person or persons, or for loss or damage to property arising out of the acts or omissions of the USS in the performance (or nonperformance) of the USS obligations under this Agreement. USS is not, however, required to protect, indemnify or hold harmless any Authority Indemnified Party for loss or claim resulting from performance (or nonperformance) of the Authority's obligations under this Agreement or the negligence or willful, misconduct of any Authority Indemnified Party. USS's aforesaid indemnity Is for the exclusive benefit of Authority Indemnified Parties and in no event shall such indemnity Inure to the benefit of any third Person.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[Title Omitted in Printing]

AFFIDAVIT

STATE OF NEW YORK)
ss.:
COUNTY OF ONEIDA)

STEVEN R. KOWALSKY, being duly sworn, deposes and says as follows:

1. I am the President of Empire Recycling Corporation, a private recycling firm that has been in the business of recycling metal and paper in the County of Oneida since 1916. Empire Recycling has been handling the recycling needs of the Counties of Oneida and Herkimer (hereinafter collectively referred to as the "Counties") prior to the creation of the Oneida-Herkimer Solid Waste Management Authority (hereinafter the Authority') and prior to the enactment of flow control laws by the Counties.

2. Empire Recycling maintains two recycling centers. One recycling center is located in Utica, New York, approximately one mile away from the Authority's Recycling Center, and the other recycling center is operated in Syracuse, New York by a division of Empire Recycling, known as S.M.R. Fibre.

3. Because of the enactment and enforcement of flow control in the Counties, Empire Recycling cannot gain access to any recyclables placed at the curbside in the Counties that it had received prior to 1990. As a result, Empire Recycling can only contract for the recyclables of businesses which maintain Empire Recycling containers at their premises for the source separation of recyclables. Empire Recycling cannot participate in the recycling of residential recyclables,

however, because the flow control laws require that curbside recyclables be delivered by haulers — such as the Plaintiffs in this action — to the Authority's Recycling Center. Accordingly, Empire Recycling cannot contract with private haulers for the purchase of curbside recyclables because of flow control.

4. Because the flow control laws apply to recyclables placed at the curb, Empire Recycling could place recycling bins at each individual residence for the collection of recyclables, without violating flow control. This approach to recycling, however, is cost-prohibitive. Individual households do not generate enough recyclable waste to justify individual contracts with those households. On a large scale, however, the residences in the Counties do generate a significant amount of recyclable material. Accordingly, but for flow control, Empire Recycling could contract with private hauling firms (such as the Plaintiffs) for the purchase of recyclables collected at the curbside.

5. The Authority's Recycling Center, which is located one mile down the road from Empire Recycling's facility, does not pay private haulers for recyclable waste collected at the curbside. But for flow control, Empire Recycling would be willing to pay private haulers — such as the Plaintiffs — for recyclables brought to Empire Recycling's facility in Utica. Empire Recycling's standard practice is to send out monthly pricing letters to its customers, which indicate the value of recyclables delivered to Empire Recycling based on market conditions. Empire Recycling enters into month-by-month pricing agreements with private haulers and even has multi-year contracts with other private organizations. When Empire Recycling enters into multi-year contracts with customers, it provides those customers with recycling bins, the contents of which are then graded, packed and sold to brokers or mills, located both in and out of the State of New York.

6. Empire Recycling engages in interstate commerce because it acts as both a processor of recyclable waste and as a broker for mills which convert recyclables into useable product. For example, Empire Recycling either (1) processes recyclables and then sells those recyclables to brokers serving as middlemen for mills or (2) sources recyclable materials for mills which turn the recyclable material into useable product.

7. The brokers and mills that Empire Recycling deals with in these situations are located both in state and out-of-state. Mills will typically buy recyclable product from recycling companies or brokers within a five hundred mile radius, which enables Empire Recycling to deal with mills as far away as Wisconsin, Montreal and South Carolina.

8. Flow control and the Authority's monopoly over curbside recyclables has impacted the recycling business of Empire Recycling. For example, in the 1980s, cardboard and newspaper were a large part of our recyclable business. Since most newspaper and cardboard had to be delivered to the Authority's Recycling Center because of flow control, Empire Recycling — and its out of state customers — were deprived of access to these recyclable products.

9. Empire Recycling and its out-of-state customers have also been impacted by the Authority's ability to charge artificially low prices to its customers as a result of flow control. Flow control causes the flow of all curbside recyclables and non-recyclables to the Authority's facilities. The non-recyclables are accepted only after payment of the $86.00 per ton tipping fee while recyclables are not paid for by the Authority. The Authority's monopoly over non-recyclable waste provides the Authority with the funds to subsidize its Recycling Center, while the monopoly over curbside recyclables gives the Authority free product to sell on the open market. As a result, the Authority can artificially lower the prices it charges for the sale of its recyclables on

the open market to brokers or mills located out-of- state and in Canada. This prevents Empire Recycling and other recycling centers across the northeast (which are not subsidized and must pay for recyclable product before its resale) from competing with the Authority for the business of brokers and milling companies.

10. In support of flow control, the Authority argues that private companies lack the incentive and ability to recycle on a consistent basis because of the fluctuating nature of the recyclables market. The Authority argues that private companies will not have the incentive or desire to collect and haul recyclable material when the recyclables market is low. I have been involved in the business of recycling for the past 20 years. In my experience, it is rare for the recyclables market to crash so dramatically that goods which are profitably recycled one day suddenly become unprofitable recyclables the next day. Moreover, when markets are weak, it is not the fault of the recycler but a function of the economy. Even when the markets are low, however, Empire Recycling continues to recycle material, but there may be times when nominal tipping fees are needed to offset processing costs. Because Empire Recycling pays for most recyclables year round, and only charges for certain recyclables (usually newspaper and cardboard) during limited periods when the markets are low, our customers over the long term still benefit by recycling. They not only avoid paying Authority tipping fees and disposal costs ($86 per ton) which always exceed the costs, if any, charged at our recycling center when the market is low, but they consistently receive payment for their recyclables.

11. While recyclables may fluctuate in value from week-to-week or month-to-month, that market fluctuation is accounted for in the month-to-month pricing agreements or the multi-year contracts executed by Empire Recycling and its customers. Consequently, it is unlikely that the market for

any particular product would crash so drastically that private companies would rescind their contracts or refuse to haul or collect recyclable material.

12. In his affidavit, Hans Arnold — the Authority's Director — argues that flow control was necessary to promote recycling because the private sector was not recycling or educating the public regarding recycling. (Arnold Aff. ¶¶30 and 33.) As part of our longstanding commitment to recycling, Empire Recycling, led by Michael Foye, Vice President of operations, has consistently donated time both before and after 1991 to boy scout groups, girl scout groups, elementary schools and junior high schools to talk about recycling, give tours and augment curriculum pertaining to recycling. Our ongoing advertising campaign includes billboard and newspaper advertising using the slogan "Our work helps the environment work." In fact, during the authority's formation, Michael Foye of Empire Recycling was critical in educating Hans Arnold, Bob Julian, Kevin Manion and other Authority employees and supporters about recycling. Empire Recycling gave tours of its own facility and gave classes on proper grade identification, collection, separation and marketing. It is therefore disingenuous for Mr. Arnold to argue that the private sector did not or does not educate the public about recycling.

13. There was no mandatory recycling in the Counties prior to the enactment and enforcement of flow control. In other words, defendants did not give the private sector the opportunity to operate under mandatory recycling laws; rather, the mandatory recycling laws and the flow control laws were enacted contemporaneously. Had the defendants only enacted mandatory recycling laws, recycling could have been promoted and accomplished by the private sector.

14. Mr. Arnold claims that the recyclable items listed in paragraph 28 of his affidavit were not being recycled by the private sector prior to the opening of the Recycling Center in

1991. (Arnold ¶30.) Attachment A-4 to his own affidavit contradicts this statement. Attachment A-4 is a letter from Empire Recycling advising the City of Utica that, because of low markets, it would be charging $30.00 per ton for newspaper. While this letter indicates that the recycling market was low in June of 1989, it also indicates that our company was indeed recycling newspaper prior to the creation of the Authority or the enactment of flow control. Moreover, the $30 per ton charged by Empire Recycling for newspaper in 1989 was significantly lower than the $88 per ton charged by the Authority the following year for the disposal of waste. Accordingly, even absent flow control, generators would have benefitted by recycling even during periods when the recyclables market was low.

15. Indeed, of the 22 grades listed in paragraph 28 of Mr. Arnold's affidavit, Empire Recycling recycles or has recycled (some materials are no longer received since the County facility opened and began enforcing flow control) newspapers and inserts, magazines and catalogues, phone books, brown grocery bags and kraft paper, junk mail, corrugated cardboard, lightweight cardboard, computer paper, glass, plastics (PET bottles), metal cans (Universal Empire, an Empire Recycling affiliate, accepts all ferrous metals), foil wrap and foil plates and automobile batteries. The only materials not recycled by Empire Recycling include hazardous waste (aerosol cans, motor oil, motor oil filters, household paint, antifreeze), yard waste (yard and garden waste and brush), swimming pool liners, beverage cartons and drink boxes. If given the opportunity, it is likely that Empire Recycling could have begun to recycle hazardous materials. If flow control was not in effect, Empire also could have implemented the new technology that has allowed the recycling of beverage cartons and drink boxes, but flow control prevents Empire Recycling from receiving that tonnage.

16. The Authority focused on newspaper as its first flow control supported recycling effort at its opening in February 1991. As a result, Empire Recycling's newspaper business decreased immediately. As a direct result of the constricting recycling streams, Empire Recycling relocated much of its paper processing operations to Liverpool, New York. The Authority did not begin to focus on corrugated, CPO, office paper, and lower grade mixed paper until after its start-up period. The appreciable decrease in material processed by Empire Recycling did not occur until some months later when the reach of mandated flow control took full effect. The fact remains that much of the paper the Authority claims was saved from being landfilled (Arnold Aff. ¶ 37) was recycled by Empire Recycling long before the opening of the Authority's Recycling Center. The figures in the chart attached as Exhibit A hereto completely contradict Mr. Arnold's claims of a non-existent private recycling market and clearly indicate the negative impact flow control has had on Empire Recycling's business.

17. Moreover, flow control is not necessary to ensure either the collection or the transportation of recyclable material, because these matters are dealt with in the contracts entered into by the municipalities and the private hauling companies. These contracts obligate the private hauling companies to collect and transport recyclables regardless of the value of any particular product in the recyclables market.

18. For example, the City of Utica has a contract with Waste Management, Inc. for the collection of all curbside material. Pursuant to this contract, Utica has given all residential homeowners bins for the collection of waste and recyclables. Waste Management then collects those bins and transports recyclables to the Authority's Recycling Center and non-recyclable waste to the Authority's facilities. Even in the absence of flow control, the City of Utica would still have the right to contract for the collection and transportation

of curbside recyclables and could require the delivery of such waste to facilities of its choosing. But absent flow control, Empire Recycling would have the ability to compete for designation as the chosen recycling facility in such contracts.

19. Because of the nature of Empire Recycling's business, and its business relationship with out-of-state mills and out-of-state brokers, flow control has significantly impacted Empire Recycling's ability to engage in interstate commerce.

20. Based on my 20 years of experience in the recycling business, I do not agree with the Authority's conclusion that flow control promotes recycling. Mandatory recycling laws, with enforcement mechanisms, are responsible for increased recycling rates, not flow control.

21. The only relationship between flow control and recycling is a financial one. In other words, the flow control laws enable the Authority to collect recyclables at no cost for resale on the open market. The tipping fees received on non-recyclables, which are directed to the Authority's facilities by flow control, are used to subsidize the Authority's Recycling Center. These funds received by the Authority can in turn be applied towards the construction and operating costs of the Recycling Center and also allow the Authority to charge artificially low prices for its recyclables on resale in the open market. While funds generated as a result of flow control enable the Authority to publicize recycling on a wider scale than might otherwise be possible, flow control is not the only means of funding public awareness projects.

22. Flow control, in and of itself, does not promote recycling — it simply provides the Counties and the Authority with funds to cover the costs of the Authority's Recycling Center and their public awareness projects. This financial benefit, however, comes at the expense of other recycling centers, such as Empire Recycling, who are

deprived of access to a valuable market and whose ability to sell to out-of-state brokers and mills is lessened due to predatory pricing and diminished access to recyclable material.

/s/ Steven R. Kowalsky
STEVEN R. KOWALSKY
President, Empire Recycling Corporation
North Genesee and Lee Streets
P.O. Box 353
Utica, New York 13503

Sworn to before me this
21 day of July, 1995

/s/ Samuel G. Spado
Notary Public

SAMUEL G. SPADO
Notary Public in the State of New York
Appointed in Oneida County
My Commission Expires April 4, 1996

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[Title Omitted in Printing]

AFFIDAVIT

HANS G. ARNOLD, being duly sworn, deposes and says:

1. My name is Hans Arnold and I serve as the Executive Director for the Oneida-Herkimer Solid Waste Management Authority, a position I have held for 14 years.

2. I've worked in the solid waste management profession for over 20 years. I earned a Bachelor of Science degree from the Pennsylvania State University and a master of regional planning from the University of Massachusetts, Amherst. In addition, I was awarded a Winston Churchill Fellowship for the study of solid waste management in Great Britain, Germany and the Netherlands. I am a past president of the New York State Association for Solid Waste Management and an active member. I am also a member of the Solid Waste Association of North America.

3. I was hired in 1978 as a planner for the Herkimer-Oneida Counties Comprehensive Planning Program (HOCCPP) and the Oneida County Environmental Management Council. My first assignments were assisting communities to update their master plans and land use regulations and coordinating environmental programs for the two county region. While working in environmental planning, the director of the HOCCPP and County

Planning Director, Michael Gapin, assigned me to work on solid waste management issues.

ONEIDA & HERKIMER COUNTIES EXPERIENCED SIGNIFICANT WASTE RELATED ENVIRONMENTAL AND PUBLIC HEALTH PROBLEMS

4. In the early 1980's it was apparent that there were significant local and national problems in managing solid waste. Not only was the national news blazing with stories of Love Canal, the Ludlow Landfill and other local hazardous waste sites also were being identified in large numbers. This is described in the 1995 Affidavits in Opposition of Robert F. Julian (Vol. VIII, Exh. 32, ¶¶ 16-24)[1] and Hans G. Arnold (Vol. III Exh. 31, ¶ 12). Many people were genuinely afraid. The region had moved from nearly every municipality having their own landfill (records indicate over 50 in the 1960's) to 20 landfills by the 1970's. None had liners or leachate collection systems and many were in areas that seriously threatened groundwater. As indicated in Michael Gapin's Affidavit in Opposition from 1995(Vol. VIII, Exh. 33) at ¶ 9:

> "In the mid to late 1960's, there was a heightening awareness of environmental impacts that were being caused by operation of the old local dumps. The public was becoming increasingly concerned about drinking water contamination, disease carrying vectors, open burning and the potential for other public health and environmental problems that were associated with historical and, at the time, on-going waste disposal practices at unlined landfills (i.e., open dumps)."

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[1] "Volume" citations refer to Defendants' Exhibits Submitted in Support of Motion for Summary Judgment.

5. Recognizing a tidal wave of problems from polluting dumps to an ever increasing volume of solid waste, the Congress enacted the Resource Conservation and Recovery Act ("RCRA"), and the Comprehensive Environmental Resource Conservation and Liability Act ("CERCLA"), comprehensive laws to overhaul the management of solid waste in the United States. These laws established a new paradigm in solid waste management: that waste generators would be ultimately responsible for any problems created by the waste they generate or the disposal facility used for their waste. The concept of perpetual environmental liability was established.

6. In the preparation of these federal laws, a very important principle was explicitly stated in the RCRA Congressional Findings: [sec. 6901 (a)) (4)]:

> "that while the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies, the problems of waste disposal as set forth above have to become a matter national in scope and in concern and necessitate Federal action."

7. It was immediately evident that local governments would be significantly involved. As New York State Supreme Court Justice Robert F. Julian indicated in his deposition (Vol. VI, Exh. 24), the environmental problems created by old landfills were thrust upon local governments (P. 32 line 24).

> "But what I'm trying to convey here is those problems (speaking previously of the Ludlow's situation) are government's problems. Whoever decides this case, if they haven't governed, ought to understand that if there is a problem with a local industry in America today, especially in the Northeast, that becomes County government's

problem. That becomes City government's problem. Businesses look to government to help them. That was the case in the middle 1980's. And that — And so any CERCLA situation that might have evolved was potentially Utica and Oneida County's problem, for that reason alone."

8. The Federal and State governments moved quickly with enforcement actions and closure orders. This significantly reduced disposal capacity. We recognized that the region could be left without any local disposal capacity, unless plans were developed and action taken.

THE PRIVATE SECTOR FAILED

9. Even with the steps taken by the Counties to develop interim facilities as outlined in the affidavit of Attorney Richard Frye, the management of solid waste in Oneida and Herkimer Counties was in disarray. The ultimate outcome of the State's enforcement actions to close old dump sites was undisputed. Yet, no new private landfills were proposed. No private waste-to-energy or other technology was proposed. And no comprehensive private initiative to handle a full range of recyclables was proposed. As indicated in the 1995 Affidavit in Opposition from Judge Robert Julian at Paragraph 26:

> "The private sector was making no effort at waste reduction and recycling. No significant private sector household waste recycling program existed in this county before or during the 1980's. The private sector waste disposal industry profits and, therefore, their viability are inexorably linked to increasing the volume of waste. Large-scale community-wide recycling would have reduced waste and reduced their profit. So they would never start recycling without a public requirement to do so."

10. The private sector made no attempt to develop new disposal capacity, trying instead to keep outdated and polluting sites open as long as possible. The Ludlow Landfill, Guerriero Landfill, and the Mohawk Valley Sanitary Landfill (owned by Waste Management Incorporated) were prime local examples.

11. During this period of numerous, high profile problems, many local haulers and private scrap business owners participated in the numerous public hearings, conducted by the Counties and the Authority. Private haulers demanded public action to provide convenient new disposal options. Scrap businesses supported public efforts to increase recycling activity. Neither group was capable of achieving these results without government involvement.

12. As the solid waste planning effort was coalescing it was clear that continued reliance solely on the private sector was unacceptable, because it would have forced the Counties to settle for a series of unfavorable conditions, including:

    - Continued reliance on environmentally unfit facilities, for an unknown period of time.
    - Abandonment of the goal to reduce and recycle as much as possible, because the private sector's overriding operational dictate is to minimize the cost of disposal. Separate collection and processing of recyclables represents a higher cost, and would be discouraged in the private sector in favor of mass disposal of all waste and no recycling.
    - Waste reduction would have been discouraged because there is no incentive for reduction in private waste hauling industry.

- Small, local private haulers would have been eliminated by the largest companies that own both disposal facilities and collection companies.
- New programs and facilities for household hazardous waste or green waste compost would not be initiated because they carry additional costs.

13. Whereas reducing the solid waste stream through recycling was emerging as a principal public policy in Oneida and Herkimer Counties, the private haulers held the opposite view as confirmed by the plaintiffs' expert Dr. Mark Berkman at page 221 of his deposition (Vol. II, Exh. 16) starting at line (1):

"Q. You don't really see a benefit in reducing the waste stream, and therefore, reducing the requirement for having larger landfills?

A: No, I don't."

EARLY FORMULATION OF A REGIONAL PLAN

14. The unique characteristics of the two-county region shaped the plan which was being developed. Oneida and Herkimer Counties comprise a vast land area – over 2,690 square miles. It is diverse in geography, ranging from the Oneida Lake Plain to the Adirondack Mountains with many small, rural watersheds. It is also demographically diverse with two major urban centers (Utica & Rome) but a total of 4 cities and 29 villages all of which have relatively dense centers of population with significant socioeconomic and ethnic diversity. Surrounding the population centers which are mainly in the Mohawk Valley corridor, there are 45 towns which range from suburban to rural and remote.

15. This region was also characterized by a common problem – how to safely manage solid waste.

16. During the period of 1968-1988 there were 4 major laws enacted by the federal and state governments that defined how regional and local governments would develop solid waste management systems. The federal RCRA and CERCLA identified the need to protect public health and the environment and to conserve natural resources and Congress envisioned the need for change and innovation to meet these objectives, as noted in Sec. 6902 (a) of the RCRA:

> "the objectives of this chapter are to promote protection of health and the environment and to conserve valuable material and energy resources by – (1) providing technical and financial assistance to State and local governments and interstate agencies for the development of solid waste management plans (including resource recovery and resource conservation systems) which will promote improved solid waste management techniques (including more effective organizational arrangements), new and improved methods of collection, separation, and recovery of solid waste, and the environmentally safe disposal of nonrecoverable residues;... (10) promoting the demonstration, construction, and application of solid waste management, resource recovery, and resource conservation systems which preserve and enhance the quality of air, water, and land resources."

17. The New York State Solid Waste Management and Resource Recovery Act (Chapter 552 Session Laws of 1980), and the Solid Waste Management Act of 1988 were enacted to implement the federal laws and policies and stated as their objectives to reduce the generation of solid waste, accelerate the recovery and reuse of secondary materials, encourage a new conservation and reuse ethic, to affect a state and local partnership, and to facilitate the planning of local solid waste management

programs. The heart of the Act of 1988 is the statewide policy intended to guide both state and local efforts:

> "Section 106. State solid waste management policy. In the interest of public health, safety and welfare and in order to conserve energy and natural resources, the state of New York, in enacting this, establishes as its policy that:
>
> 1. The following are the solid waste management priorities in this state:
>
> (a) first, to reduce the amount of solid waste generated;
>
> (b) second, to reuse material for the purpose for which it was originally intended or to recycle material that cannot be reused;
>
> (c) third, to recover, in an environmentally acceptable manner, energy from solid waste that can not be economically and technically reused or recycled; and
>
> (d) fourth, to dispose of solid waste that is not being reused, recycled or from which energy is not being recovered, by land burial or other methods approved by the departments."

18. Based on common problems and a history of regional cooperation, there was a natural interest by the Counties to collaborate in solid waste management planning. Oneida County and Herkimer County had a longstanding working relationship and a track record of joint regional projects addressing significant issues. Transportation, transit, criminal justice, and land use planning were and are joint regional efforts by the two Counties.

19. The planning effort dedicated considerable resources to evaluate different technology options. In a July 1982 report, "Utica Area Resource Recovery Project –

Feasibility Study", there was an evaluation of recycling and waste-to-energy for the Utica area. The options for reduction and recycling were extensively considered in the August 1985 "Report on Waste Reduction and Recycling". As documented in the June 1986 "Final Draft Report Long Range Alternatives" the Counties evaluated the general alternatives of building a second waste-to-energy facility to serve Eastern Oneida County and Herkimer County, building a new raw waste landfill to serve the two Counties combined, building a new landfill for each County, or taking no action. It evaluated pyrolysis, composting, refuse derived fuel, mass burn technologies and region-wide recycling. Facilities throughout the Country were visited. Operational reliability and environmental compliance were reviewed. (A list of major reports completed as part of the Counties' planning efforts starting in 1966 can be found in paragraph 7 of Richard Frye's affidavit.)

20. The planning efforts also evaluated alternative funding methods. Oneida and Herkimer Counties have large areas which are undeveloped and the two major cities, Utica and Rome, have a high percentage of tax exempt property. These two factors were warning signals that using the property tax to generate the revenue for solid waste facilities would be problematic. The property tax bears no direct relationship to the level of solid waste service demanded and many properties which do demand waste service would be exempt. For these reasons, the property tax would have been a wholly unfair funding mechanism.

21. There had to be a funding mechanism that was fair — that would create a direct relationship between the volume of waste and the amount paid. Through a direct financial incentive, this would encourage waste reduction and recycling, the fundamental goals of the Counties.

22. There was an extensive network of public participation integral to the planning efforts started by the Counties and continuing through the service clubs, environmental groups, industry organizations and numerous public hearings sponsored by the County Legislatures. This public process became a foundation for the elected county representatives to develop policies and a plan and then move forward with implementation.

23. The entire picture of solid waste management was coming into focus by the mid 1980's and a series of public policies was taking shape:

    - Environmental protection had to be guaranteed.
    - Reduction and recycling had to be the top priority.
    - The system had to be fair and equitable to all waste generators.

24. The importance of a public solid waste management system was articulated by Michael Gapin in his 1995 Affidavit in Opposition paragraphs 3 & 4:

> "3. One of the fundamental principles of community planning and economic development is that there are three basic public "utility" functions which are essential to the economic and environmental well-being of a region. These are the provision of systems for a clean supply of water, for treating wastewater discharges, and for managing solid waste. In order for an area to be viable, it must be able to provide its citizens, businesses and industries with these three essential systems. For each, the system must provide safe, reliable consistent service. In order for an area to grow, to bring in new development and job creating industries, these basic pieces of public infrastructure must be in place. They are essential elements of

good economic policy. They are no less important to a region's viability than roads, bridges and schools."

"4. If a community establishes the public policies to secure and develop these systems, the community has taken a major step in enhancing and securing its future. A community, as part of these pubic policies, can establish community goals such as creating expansion capacity to attract new development. And, in the case of solid waste management, a community can develop a secure public system for the long-term that advances resource conservation, reduces dependence on disposal and provides environmental and economic security. The public policies developed in these two Counties for all three of the major public utility systems have been working toward securing the region's viability for the future. All three public utility systems are essential to our future."

ELEMENTS OF A MODERN SOLID WASTE MANAGEMENT PLAN

25. A modern solid waste management plan and system requires a unified, cohesive plan for all waste streams and all generators. Control over the waste stream is critical to document its characteristics and changes, to direct its components to the most appropriate and environmentally sound facility, to create the flexibility to change waste direction to a new facility when conditions warrant, and to provide environmental security to all generators.

26. Through this planning and public policy process the Counties came to a clear conclusion, as noted in the Affidavit in Opposition from 1995 by Judge Julian at p. 22:

"45. There was a strong, broad-based consensus among citizens, businesses, industries and local

elected officials that there had to be a regional and public system of programs and facilities to serve the solid waste management needs and objectives of Oneida and Herkimer Counties. Based on extensive interaction with the public, it was clear that they wanted a new recycling based approach. They wanted their duly elected representatives to put a solid waste management system in place that would increase and reward waste reduction, require recycling and make sure that the environment and their health and safety was protected."

27. Public control was necessary to accomplish goals that are not market driven. Waste reduction and recycling are not profitable and require public subsidy. Judge Julian in his deposition pointed out why recycling would fail if it were left solely to the private sector (P. 14 line 27):

> "The private sector waste disposal industry profits, and therefore, their viability are inexorably linked to increasing the volume of waste. Large-scale community-wide recycling would have reduced waste and reduced their profit. So they would never start recycling without a public requirement to do so."

28. The plaintiffs' own expert, Dr. Mark Berkman, confirmed the plaintiffs position in his deposition at page 129 starting at line 6:

> "because I think that everyone is better served to let the hauler decide where the least-cost disposal site for him or her to deliver the waste is. That way they'll get the lowest-cost solution to the problem".

29. Judge Julian in his deposition also commented on the wisdom of a strong policy commitment to recycling (P. 41 line 5):

> "So my analysis as an elected official who had responsibility for consensus within my caucus, as well as my district, I thought the cost benefit analysis for recycling far outweighed the risk and the problems associated therewith. And it is on that point that I think I have more experience, respectfully, than anybody in the judicial food chain of this case, as a public official listening to people day in and day out. That was my call. It was a judgment call, along with the members of the County Legislature who stood in my shoes, and the County Executive. And we thought it was sound public policy, and our Electorate agreed with us."

30. From a purely operational view, public control is necessary to inspect the waste, to screen out toxic and hazardous constituents, to direct each component of the waste stream to the most appropriate facility, and to insure the flexibility to change that direction when future conditions warrant.

31. Public control is necessary to provide the highest level of environmental protection to all waste generators within a system.

32. There was a clear sense that in order to achieve the fundamental policy goals there would have to be significant public control. In his deposition, Judge Julian made the connection between environmental protection and public control (P. 55 line 10):

> "I — I would — In the sense that I view solid waste as — not a commodity so much as a — as a risk, as an item that poses a risk to the public health and well-being, it is — that is what motivated my thinking. That is what I thought then. That is what I think now. It is the responsibility of government, under the statutory law of the State of New York, Local government, to maintain public health and

well-being ... I know of no other was to do it that would allow the government — the local government to maintain reasonable control over solid waste, which I view as an instrumentality that has potential to cause public health problems if not properly managed."

33. There was a consensus among County elected officials that we should take care of the waste we generate. The Counties had settled on the need for an exclusive public system encompassing all the solid waste generated in the region.

34. The Counties' reconfirmed their policy commitment to the public system in a 1996 when the Counties and the Authority were faced with the uncertainty of this litigation. After the Supreme Court's decision in Carbone and in light of new decisions by the Second Circuit Court of Appeals in USA Recycling v. Town of Babylon, and SSC Corp. v. Town of Smithtown, the Counties and the Authority prepared a report, "System Status and Future Alternatives" May 3, 1996. (Vol. IX, Exh. 38) Although the report carefully considered instituting region-wide public collection, a group of private haulers proposed a series of waste commitment contracts as an alternative that was ultimately pursued. In considering the report, Oneida County enacted a resolution (Vol. IX, Exh. 39), which reconfirmed their policy commitment "that the provision of a uniform, exclusive public waste recycling and disposal service through the existing Integrated System provides the best means of maximizing waste reduction, reuse and recycling services, and the only means of assuring that such services, together with environmentally secure disposal services are provided on an equitable basis to all citizens of the County;" and that "the restoration of an open market waste disposal system in the region would undermine solid waste planning efforts ...."

35. Oneida and Herkimer Counties have over 35 years of significant involvement in solid waste management issues, first in recognizing the nature and extent of environmental and public health problems, and then developing and implementing a phased plan for a comprehensive system.

36. This community made a definitive choice for a particular solid waste management system to meet its unique needs.

THE LOCAL LAWS

37. In his 1995 Affidavit in Opposition, Judge Julian set out the objectives of the Local Laws at page 23 paragraph 46:

- "To replace high volume, undifferentiated waste and disposal with a system that would match the best management method to each component of solid waste. The draft local law created separate provisions for each major category of waste.
- To make waste reduction and recycling the legally mandated top priorities for solid waste management in the County.
- To establish and expand markets for recyclables.
- To protect the public health, safety and welfare by requiring regular collection and environmentally sound waste processing and disposal throughout the Counties.
- To stop backyard burning and roadside dumping of waste.
- To make sure that both recyclables and waste would be set-out at the road, by waste generators, in a form and manner to insure its proper delivery to the recycling and disposal facilities.
- To establish a basic framework of responsibility, consistent with state and federal laws, for waste

generators, haulers, towns, villages, cities and the county or its agent.

- To conserve vital natural resources."

38. The Counties enacted the local solid waste management laws in 1988 (amended in 1989) thereby establishing the policies developed over many years as the legal foundation and means to meet the needs of the community. The local laws establish fundamental responsibilities for every citizen, each waste generator, each municipality, each hauler, and both Counties. The local laws (full text in Vol. I, Exhibits 12 & 13):

    - Require every citizen and waste generator to provide for the proper disposition of all the waste they generate. The local laws require citizens and generators to source separate recyclables so that material can be recovered and not landfilled. (Oneida County Local Law #1 of 1990 ("OCLL") Sec 2, Herkimer County Local Law #1990 ("HCLL") Sec 2).

    - Require further separation and appropriate management of household hazardous waste, green waste, construction and demolition debris and other waste streams. (OCLL Sec 4a, 4b, 5a, 5b, 6a, 6b, 7a, 7b, 8a, 86; HC Sec 4a, 4b, 5a, 5b, 6a, 6b, 7a, 7b, 8a, 8b)

    - Provide for the composting of green waste (OCLL Sec 5; HCLL Sec 5)

    - Provide for the recovery of farm and household hazardous waste (OCLL Sec 8; HCLL Sec 8)

    - Require each municipality to provide for regular and reliable collection of all categories of waste and recyclables and to prepare an implementation schedule for approval by the Counties. (OCLL Sec 2, 4a, 5a, 6a, 7a; HCLL Sec 2m 4a 5a 6a 7a)

- Direct the disposition of all waste, therein providing a means to manage each component waste stream, to inspect recyclable and nonrecyclable waste, and to stop backyard burning and roadside dumping.(OCLL Sec 10, 11; HCLL Sec 10, 11)
- Provide for the competitive marketing of all recyclables received by the Authority, and provide for the direct private marketing of recyclables by generators (OCLL Sec 3, 6; HCLL Sec 3, 6)
- Require all waste haulers to obtain a permit (OCLL Sec 10; HCLL Sec 10)

39. The local laws establish a means to integrate both the handling of solid waste (by requiring source separation by the citizens and all generators and by simultaneously requiring all public and private haulers to deliver segregated material to various County designated public facilities) and ultimately a source of funding that would both encourage waste reduction and recycling and pay for wide range of reduction and recycling facilities and programs.

THE ONEIDA-HERKIMER SOLID WASTE MANAGEMENT SYSTEM

40. With the vision of the Counties, the elements of a comprehensive regional plan and the legal foundation of the local laws, the Counties and State created the Authority as the institutional means to translate these efforts into a concrete realization of the Counties' goals.

41. By 1991 there were no private facilities remaining in Oneida County or Herkimer County for the disposal of municipal solid waste. The only public facility in operation was the Oneida County ERF which had capacity for only a small quantity of the region's waste.

42. In 1991 the Authority adopted a final Local Solid Waste Management Plan which was approved by the State. The

Plan is at Vol. IX, Exhibit 37. The first paragraph of the Plan at p. 4 states:

> "The overall goal of the Oneida-Herkimer Solid Waste Management Authority is to provide for maximum levels of waste reduction and recycling, coupled with the development of environmentally and economically sound programs and facilities for the remainder of the waste stream. It is the intention of the Authority to continue to increase reduction and recycling programs and to plan all facilities to reflect these maximum feasible recovery levels."

43. This "overall goal" of "maximum levels of waste reduction and recycling" of the Oneida-Herkimer system stands in sharp contrast to the plaintiff haulers' view of the benefit of waste reduction as stated by their expert, Dr. Mark Berkman at page 221 of his deposition starting at line (1):

"Q. You don't really see a benefit in reducing the waste stream, and therefore, reducing the requirement for having larger landfills?

A. No, I don't."

44. The Authority has gone forward and developed an integrated system of programs and facilities to implement the plan. The system operates beginning with the requirements of the Local Laws that all generators and haulers deliver each component of the overall waste stream to the designated facility. An integrated system fee is charged only on nonrecyclable waste, thereby creating the most direct financial incentive to reduce and recycle. A portion of the revenues from the integrated system fee is then used to pay for the reduction and recycling facilities and programs.

45. The Authority serves the two-county population of just under 300,000, owns over 1,000 acres of land, owns and

operates 8 facilities with 58 employees and an annual budget of $24 million. The major elements of the Oneida-Herkimer integrated system are noted below and a timeline of facility development is at Appendix A.

46. The Authority system includes waste reduction programs.

    a. Waste audits for over 350 major industries, businesses and institutions. Appendix B describes the waste reduction measures taken by 17 representative industries.

    b. Distribution of over 100,000 posters explaining actions residents can take to reduce waste.

    c. Multi-media advertisements showing consumers how to purchase products with less packaging.

    d. A waste reduction and recycling curriculum for grades K-8 for each school in the two counties.

47. The Authority system establishes source-separation of recyclables as a means to most effectively maximize recycling and reduce non-recyclable waste disposal in our region. The Local Laws require waste generators to separate recyclable materials from waste at their source and either market them directly or place them at roadside (curbside) in a condition suitable for acceptance at Authority facilities. The system creates a direct economic incentive to recycle because no fee is charged for delivery of recyclables. The main components of the recycling program in Oneida-Herkimer are:

    a. 37 different household materials that can be recycled with only 2 separations required. A list of recyclables can be found at Appendix C.

    b. A $10 million Recycling Center that segregates, processes, and markets household, commercial and industrial recyclables.

    c. Authority responsibility as the market of last resort.

d. Recovery of specialty items like computers, bulk metal and appliances, motor oil, automobile batteries, antifreeze, wood pallets and latex paint.

e. A green waste compost facility for brush, leaves, and grass clippings.

f. A clearing-house for private recycling activity.

g. Distribution of over 500,000 recycling instruction posters.

48. The Authority recycling programs received the Governor's 2001 Award for Excellence.

49. Recycling requires financial subsidy. To cover operating and debt service expenses, the Authority has used $29.5 million from the integrated system fee for 1991-2002. This is the financial commitment necessary, in addition to the revenue received from the sale of recyclables, to cover all the costs of recycling. This illuminates a choice made by this community to handle its waste in a particular way, through recycling, that is not the lowest cost approach.

50. The Authority system includes an extensive waste detoxification program. The Local Laws require the separation of household hazardous waste and farm hazardous waste and the delivery to a designated facility. This service is funded by a portion of the integrated system fee and no direct fee is charged to residential or agricultural generators. If a fee were charged, because of the toxic and complex nature of the material and the associated high cost for proper disposal, there would be little if any participation. This service is the only alternative available to residents and generators of small quantities of hazardous waste who cannot afford the high cost of private service. The Authority system includes facilities and programs to accomplish this requirement of the Local Laws:

a. A permanent Household Hazardous Waste facility that removes pesticides, herbicides, pool chemicals, photographic chemicals, laboratory chemicals, lead paint, solvents, thinners, contaminated fuel, batteries, mercury light fixtures, electronics and numerous other hazardous materials. Annual totals can be found at Appendix D.

b. A conditionally exempt small quantity generator program for businesses and industry to remove specified quantities of hazardous waste.

c. A certified CFC removal and containment program for refrigerators, air conditions and other appliances.

51. The Oneida-Herkimer system includes facilities for disposal of nonrecyclable waste, currently accomplished through contracts with two public and one private facility. These in combination provide for the safe disposal of approximately 250,000 tons of nonrecyclable waste per year. The private facilities used for disposal are procured by the Authority through public bidding. Therefore, generators are made aware of the method of disposal, the location and identity of the disposal facility, and the cost of disposal. Total nonrecyclables processed by the Authority per year can be found at Appendix E.

52. The Authority contracts with these landfill facilities only after interviewing state regulators and an indepth review of the site geology, surrounding land use, surface water and groundwater conditions, regulatory compliance, leachate collection and monitoring, air emissions monitoring and treatment, other users of the facility and the character of their waste, and other factors relevant to the environmental integrity of the facility.

53. In the case of the private landfill referred to paragraph 51, which receives over 90% of the nonrecyclable waste handled by the Authority, the facility is selected through

an open competitive bidding process which is locally and nationally advertised.

54. Before delivery to the contract disposal facilities, the local collection trucks used by public and private haulers deliver the nonrecyclable waste to one of three Authority transfer stations which provide:

    a. Centrally located facilities, convenient locations for haulers, contractors, businesses and individuals to discharge nonrecyclable waste.

    b. Enclosed buildings to discharge waste, spread it out, inspect it, remove incompatible and recoverable materials, and then load it into transfer trailers.

    c. A means to aggregate waste delivered in 350 loads per day into about 35 large transfer trailers.

55. Waste delivered to the transfer stations is carefully inspected to identify and remove toxic and hazardous materials and identify any other problems. New opportunities for recycling are also identified through this process. Inspection on the transfer station tip floors is coordinated with other monitoring, tracking, and inspection of solid waste and enforcement critical to protect public health and the environment. Appendix F is a copy of the Authority's "Non Compliance Management Guidelines", a memo explaining the procedures for waste tracking and audits, and a copy of the facility rules and regulations. The Authority system includes:

    a. Licensing of all haulers.

    b. Cradle-to-grave documentation of major industrial wastes through uniform tracking documents.

    c. Inspection of nonrecyclable waste and removal of hazardous items and other problematic wastes at each Authority transfer station. A summary of the penalties

assessed on loads of waste containing recyclables can be found at Appendix G.

d. Inspection of recyclables to remove contaminants and to identify new opportunities.

e. Review of set out practices by residents, businesses, industries and institutions.

f. Prosecution by town, village, city, county and state law enforcement authorities of the prohibitions on roadside dumping and backyard burning – estimated to be 80 violations annually.

g. Prosecution by the Authority against haulers that commingle source separated recyclables with solid waste.

56. The Authority system includes a proposed landfill facility to insure safe and reliable local disposal. The Authority has to date invested nearly $12 million in the environmental, legal, and permitting work necessary to develop this state-of-the-art facility. It will provide a 62 year useful life and will employ a double composite liner system, full leachate collection and treatment, gas collection and energy recovery, and over 100 groundwater monitoring wells.

57. The Authority system also includes long range planning to gather accurate data concerning waste volumes and characteristics, to review and evaluate industry trends, market conditions, regulatory changes, legislative proposals, scientific research, and advances in technology. This allows the Authority to plan intelligently for the solid waste management needs of Oneida and Herkimer Counties. The Authority, as provided in the New York State Solid Waste Management Act of 1988, is a Planning Unit and developed a local solid waste management plan. The formal steps for this plan, started by the Counties and

completed by the Authority, are outlined at Appendix H. In addition to the above noted ongoing planning activities, reports and evaluations have been done to address critical issues that have been on the future configuration of the system:

a. An evaluation of pay-as-you-throw systems which served as the basis for several local municipalities to adopt per bag systems. ("Solid Waste Collection and Disposal: Billing and Payment Alternatives", 1988).

b. An evaluation of providing a common recycling container for each household in the region.

c. An evaluation of the feasibility of co-composting green waste and wastewater treatment sludge. ("Sewage Sludge Management Alternatives", 1993 and "Evaluation of Municipal Solid Waste Composting Technologies", 1993).

d. A study of the feasibility of recycling construction and demolition debris ("Construction and Demolition Debris Management and Equipment Evaluation", 1991).

e. An evaluation of a waste wood energy recovery unit that could process pallets.

f. An evaluation of the cost of upgrading the units used locally to manage biomedical waste, ("Technical and Cost Analysis For Upgrading Existing Infectious Waste Incinerators", 1988).

g. An evaluation of the impact of new air emissions standards for waste-to-energy facilities and the impact of energy revenues on the feasibility of waste-to-energy ("Energy Recovery Facility Future Options", 1994).

h. A report entitled "Alternative Municipal Solid Waste Processing Technologies", 1993.

i. Consideration of alternative waste processing technologies, through an RFP for a demonstration project. (2003)

j. An evaluation of region-wide public collection ("System Status and Future Alternatives", May 3, 1996). (Vol. IX, Exh. 38).

k. A long term economic analysis comparing a local landfill option with the export option in terms of cost and other factors ("Market Profile For Municipal Solid Waste Management in Oneida and Herkimer Counties, New York" Arthur D. Little, 1997). (Vol. IX, Exh. 36).

58. Through the revenue generated by the collection of the integrated system fee, the Authority and Counties are able to conduct an extensive educational and public information program including:

    a. Waste and recycling audits for businesses and industries.

    b. Several university science laboratory courses are taught at the recycling center.

    c. Tours of the Recycling Center, Household Hazardous Waste Facility and Green Waste Compost Facility to over 12,000 individuals from various schools, industries, businesses, municipalities and foreign governments.

    d. Yearly Recycling Champion Awards to outstanding examples of local businesses, institutions and municipalities who recycle in innovative ways.

    e. A "Just Mow It Program", which encourages residents to compost or mulch their grass clippings instead of bagging and disposing of the clippings.

f. "ComPoster", a practical guide to managing organic waste at home.

g. A "Recycling is Good Business" program for area businesses, industries, and institutions. The program focuses on methods to reduce and recycle wastes at the work place.

h. A comprehensive website.

i. Assistance to environmental benefit groups for clean-ups at environmentally sensitive locations, donations and other programs.

59. The system developed by the Authority has transformed solid waste management in Oneida and Herkimer Counties into a highly responsive, environmentally sound public system. The environmental commitment demonstrated in the system was noted by Dr. Stavins in his deposition at page 165 starting at line 7:

> "When I say high level, I don't want to, you know, be overly dramatic. I've spent a lot of time in my career working with local governments, businesses. It is rare that I have actually experienced one, this is neither praise nor an insult, it is actually a neutral characterization, it is rare that I have experienced the degree of obvious concern for the environment as the Authority happens to have."

THE BENEFITS

60. The system allows the Counties to efficiently and effectively fulfill their traditional local government role of providing safe, reliable, and economical sanitation service to the public, and thereby protect the health, safety and welfare of the public and environment. A full description of benefits can be found in the Response to Interrogatories found at Vol. I, Exhibit 11.

61. The Oneida-Herkimer system produces a vast array of public benefits. The system maximizes reduction, reuse, and recycling of all solid waste generated within the two county region; provides safe and environmentally secure means of disposal of the remaining waste stream; avoids generator liability for area residents for disposal of waste in non-secure facilities; apportions the costs of solid waste management among all citizens of the region on the basis of amounts of waste generated; stimulates competition in private collection services by allowing for an even playing field in disposal costs for haulers; provides financial stability for the activities undertaken by the Authority.

62. Whereas the Authority has established a direct economic incentive to reduce and recycle, the haulers want to see as much waste as possible produced. Their expert Dr. Mark Berkman wants to preserve the archaic notion that there is no benefit to reducing the waste stream, Berkman deposition page 221 starting at line (1):

"Q. You don't really see a benefit in reducing the waste stream, and therefore, reducing the requirement for having larger landfills?

A: No, I don't."

63. The integrated system provides an ongoing evaluation so that changes can be made to existing programs and facilities and new ones can be regularly considered that may provide an improved means of accomplishing the goals of the system. As in the past, new facilities and programs may not be the cheapest approach, which is the only approach which would be followed by the private sector. Ongoing planning with public participation make the system continually adaptive and preserves the community's ability to

provide a system to meet its unique needs. For example, the Authority is currently considering a partnership with a private company that would install a 3 stage waste pyrolysis program for the ultimate production of natural gas and electricity for the region's largest industrial park. This proposal would significantly advance the waste reduction, recycling, and resource recovery objectives of the Authority. This also meets the goals of the RCRA and State Solid Waste Management Laws that envisioned innovation and new approaches to reduce waste and conserve resources. To achieve these goal, the Authority has to be able to redirect suitable components of the waste stream to the facility. Only local government is in the position to foster this kind of innovation because it may not be the cheapest approach in the short-term.

64. The benefits to the citizens of the Counties from the waste inspection, tracking, enforcement, and household hazardous waste system elements are:

    a. Cleaner, safer waste streams that reduce toxic leachate and air contaminants.

    b. Reduced environmental liability for all generators.

    c. Reduced illegal dumping and associated pollution.

    d. Removal of 31,309 gallons of pesticides, herbicides and other chemicals.

    e. Removal of 34,605 gallons of solvents and thinners.

65. The benefits to the citizens of the Counties from the recycling elements of the system are:

    a. Direct economic incentive to recycling because no fee is charged for the delivery of recyclables.

b. Over 400,000 tons of recyclable material have been processed by the Authority since the opening of the Recycling Center (materials recovery facility) in 1991. Sale of recyclable materials has brought over $14 million, in support of the system. The system's Recycling Center is capable of processing seven grades of paper, six grades of plastic, four grades of glass, two grades of aluminum, and ferrous metals.

c. 400,000 tons of recyclables processed represents over 1.6 years of regional waste generation not consigned to landfill disposal.

d. Recycling avoids disposal costs — estimated at $18,000,000.

e. The Authority is the market of last resort for many area businesses, so area businesses can bring the recyclable materials to Authority during times when there is no other cost effective market or outlet available for such recyclable materials.

f. The Authority's receipt of recyclables during poor market periods provides support for private sector recycling activity. Generators and haulers can bypass the Authority when markets are favorable. Markets for recyclables fluctuate significantly, see Appendix I.

g. By being continually available as an outlet for recyclable materials, the Authority's system helps solidify the commitment of the public to recycling. Consistent availability for the receipt of recyclables avoids inconsistent messages based on fluctuating market conditions, and reinforces the habit of recycling in residential generators.

h. A single set of recycling instructions to establish consistent practices throughout the region

enhancing both participation and the quality of recyclables.

i. The Recycling Center provides a full range recyclables processing services which have never been offered by any other private entity in the Oneida-Herkimer region.

j. The computer recycling program, one of the first in the country, has provided for the recovery of over 1,600 computers and 580 monitors. The high grade metals (such as silver, gold, platinum, palladium, and copper) are recovered for reuse, as are the low grade plastic components.

k. Over 116,692 gallons of paint, taken at no charge to residents has been recovered or recycled.

l. Over 106,090 gallons of used oil has been recovered and refined and reused.

m. Over 8,343 gallons of antifreeze has been recycled.

n. Over 86 tons of automotive batteries have been recycled.

o. The local laws comply with and implement the State legislation that requires every community to enact a source separation law.

p. Since the establishment of the Compost Facility over 140,000 tons of green waste has been diverted from landfill disposal for processing as compost.

q. The Authority has sold or given away over 50,000 cubic yards of compost product to residents and commercial users, (schools, golf courses, parks, etc.).

r. The Authority has sold over 20,000 bags of finished compost product to residents since 1997. Purchases of compost product by residents and businesses close the recycling loop for green waste by re-using waste products generated locally.

s. The Compost Facility provides services which have never been made available by any other private entity in the Oneida-Herkimer region.

t. Mills throughout the country convert Oneida-Herkimer recyclables into new products, see Appendix J.

u. Recyclables processing and marketing services have been made available for materials delivered by neighboring municipalities for tipping fees. Over 17,000 tons, from municipalities without processing capability, or equivalent access to markets, have been received since 1991.

66. The benefits to the citizens of the Counties from the current system elements for managing nonrecyclable waste are:

a. The safe disposal of 250,000 tons of waste per year on a continuous basis for over 11 years.

b. Generators are made aware of exactly where their waste is taken, and what the environmental track record is for the disposal facility.

c. Waste generators are protected by the Authority from future environmental liability.

d. All users of the system are protected from liability because of the rigorous program to characterize waste, screen and enforce.

e. Transportation to the ultimate disposal facility is provided by the Authority, thereby leaving

generators and haulers only with the responsibility and cost to deliver waste to a local transfer site.

67. In the event that the Authority constructs and operates a publicly owned landfill in the future, such a facility, operating within the integrated management system and conjunction with the Local Laws would have the following additional benefits:

    a. The public interest in maximizing recycling and reducing the amount of waste disposed of in the landfill would complement the Authority's institutional interest in preserving the available capacity of the landfill as long as possible. The landfill will be constructed in a series of sequential cells, constructed two at a time, to a total of 19 over the sixty year projected life. Reduction and recycling will prolong the life of each cell thereby improving the long term financial standing by leveling public investment.

    b. State legislative prohibitions against the acceptance of out-of-region waste at Authority facilities are in effect and serve to prolong the life of the facility. The prohibition against importing underscores the fundamental objective of the Counties – to fulfill a traditional local governmental option to provide sanitation service – and in this instance, only for the residents, businesses, industries and institutions of Oneida and Herkimer Counties.

    c. Restrictions against acceptance of non-recyclable waste generated outside of the Counties would preclude liability risks arising from the commingling of local waste with waste from unknown sources.

d. Environmental conditions and operations would be directly within the control of the Authority and thereby fully accessible to the public.

e. Generators will be relying on a single, new facility with local, known origins of waste. Generators will no longer rely on multiple sites serving massive numbers of generators from a broad geographic area. New construction according to current NYSDEC regulations would provide generators the best assurance against environmental injury and eliminate future risk of CERCLA and other potential liability arising from use of private sites in other locations.

f. The proposed landfill will be less expensive than the cost of exporting based on an update for the landfill construction cost done in late 2002.

g. Use of the proposed landfill will reduce fuel consumption and the associated air pollution and cost.

h. It will guarantee Oneida and Herkimer Counties' disposal capacity even if private facilities are fully subscribed or are closed for regulatory or other reasons.

i. It will protect the Counties against the uncertainty and cost of tariffs, or other restrictions that may be authorized by Congress, on waste importation.

j. It will protect the Counties against the uncertainty of costs resulting from industry consolidation.

68. As stated in the report done in 1997 by Arthur D. Little, Inc., "Market Profile For Municipal Solid Waste Management in Oneida and Herkimer Counties, New York", in their Findings and Conclusions:

"If the Authority proceeds with obtaining the necessary approvals and permits for development of the proposed local public landfill, this will help the Authority avoid many of the uncertainties noted herein and provide flexibility and leverage for future decision making. In particular, this would provide a disposal alternative based much more on actual costs than on market conditions. Specifically, it would reduce the influence of market uncertainties such as price increases, facility closures and changes in laws governing interstate transport or flow control. Permission to build its own landfill would also give the Authority greater flexibility in managing local industrial and special wastes. In addition to eliminating much uncertainty in the costs to be incurred, having this alternative at a minimum would be expected to significantly enhance the Authority's leverage in contracting with disposal service providers, should it choose to do so, Once approvals are obtained, the Authority can reevaluate market conditions and all key factors affecting its decisions."

CONCLUSION

69. The public benefits of the Oneida-Herkimer solid waste management system are in stark contrast to the methods of the past and the purely market diverse approach of the private sector. Very simply, the plaintiffs seek to nullify the local laws and create a circumstance where they could substitute their judgment for that of the generator, local elected officials, and the community with respect to whether or not to recycle and how to manage each component of the waste stream. Left solely to the private market, there would be no separation of recyclables, green waste, or household hazardous waste and there would be no promotion of waste reduction because all of

these activities either cost more than disposal or they would reduce the volume of waste and their profits.

70. After experiencing a 20 year environmental nightmare, in 1988 Oneida County and Herkimer County enacted local laws they knew were absolutely necessary to solve the problem. This was a response to real and prevalent problems. This was a conscious decision by a community's elected officials who listened to their citizens. This was a normal response, typical of many communities across the Country, and recognized as such by the Second Circuit of Appeals, in United Haulers:

> "In the past, we have held that a municipality "has legitimate—indeed, compelling—interests that are served by its waste management program." *USA Recycling*, 66 F.3d at 1288. In *USA Recycling* we went so far as to state that "[t]he local interests that are served by consolidating garbage service in the hands of the town-safety, sanitation, reliable garbage service, cheaper service to residents-would in any event outweigh any arguable burdens placed on interstate commerce."

The final plan and the system built on those Local Laws also represents a conscious decision by a community for a particular way to manage solid waste – a way that is finely tuned to their needs and the character of the region.

/s/ Hans G. Arnold
Hans G. Arnold

Sworn to before me this

10th day of April, 2003

/s/ Mary Brendeu Daishan
Notary Public-State of New York
My Commission expires 1/14/2007

Oneida-Herkimer Solid Waste Management Authority
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FINAL LOCAL SOLID WASTE MANAGEMENT SYSTEM PLAN

May 20, 1991

INTEGRATED SOLID WASTE MANAGEMENT SYSTEM

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The following is provided for cross-reference to the Final Generic Environmental Impact Statement (FGEIS).

FGEIS APPENDICES

Volume 1 Appendix A	Comments and Response Letters (all comments were also summarized in FGEIS text with corresponding responses, supplementing response letters contained herein).
Volume 2 Appendix B	Comments and Responses
Volume 2 Appendix C	Legislation, Involved and Interested Agencies/Government Officials' Comments
Volume 3 Appendix D	Transcripts, June 7, 1989, June 16, 1989, June 19, 1989, July 11, 1989, July 13, 1989
Volume 4 Appendix E	Transcripts, August 21, 1989, September 19, 1989, November 20, 1989, November 30, 1989, December 11, 1989
Volume 5 Appendix F	Transcript, December 18, 1989
Volume 5 Appendix G	Form Letters and Petitions
Volume 5 Appendix H	Supplemental DGEIS, Candidate Sites 023-TR2, 023-TR3, and H24-NE1 -- November 1989
Volume 6 Appendix I	Supplemental DGEIS, Candidate Sites 015-TR2, 023-TR1, 023-TR4, and H24-DE1 -- May 1990
Volume 6 Appendix J	Evaluation of Hydrogeologic Conditions at Mohawk Valley Sanitary Landfill, Frankfort, New York

Volume 6 Appendix K	Hydrogeologic Evaluation of three Landfill Sites in Oneida and Herkimer Counties New York
Volume 7 Appendix L	Comprehensive Recycling Analysis
Volume 8 Appendix M	Miscellaneous

EXECUTIVE SUMMARY

The overall goal of the Oneida-Herkimer Solid Waste Management Authority is to provide for maximum levels of waste reduction and recycling, coupled with the development of environmentally and economically sound programs and facilities for the remainder of the waste stream. It is the intention of the Authority to continue to increase reduction and recycling programs and to plan all facilities to reflect these maximum feasible recovery levels.

The immediate and foremost priority is the completion of the Oneida-Herkimer Recycling Center. The operation of this facility will provide the best possible method for processing and marketing 200 tons per day of recyclables. Its capacity may be increased in the future if participation rates warrant. Market contracts are in place for processed newspaper, corrugated cardboard, high grade paper, magazines, tin cans, aluminum, glass, and PET, PVC and HDPE plastics. Currently, the Authority is also actively seeking markets for other paper (i.e. junk mail) and other plastics (i.e. polypropylene). The Authority will continue to employ a rate structure which rewards and promotes reduction and recycling. The Authority will also expand education and other efforts to improve participation in recycling and increase recovery rates.

The Authority will continue efforts to improve the operation of the Energy Recovery Facility (ERF). The feasibility of new air pollution control equipment to improve acid gas emissions will be evaluated in the coming year. Additional measures, as set forth in the plan, will be taken to monitor environmental conditions relative to the facility.

The Authority believes that a waste-to-energy facility can be safely and efficiently operated and can therefore be part of an integrated system plan. At the same time, the Authority will

actively consider other waste processing options to meet its objectives. The full range of options for new waste processing capacity will be considered and evaluated with respect to environmental and economic factors. With respect to waste-to-energy, this may involve continued operation of the existing facility closure of the existing facility, expansion of the existing facility, construction of a new facility or some combination thereof. The waste-to-energy component will be developed as part of the overall integrated plan and may be done in combination with some other waste processing capacity. The siting for any new waste processing capacity will follow an amended procedure to be developed by the Authority.

The Authority intends to identify a new candidate landfill site or sites which will be arrived at by using an amended siting methodology. The Authority believes that it is essential to identity such a site to meet the objectives of sound environmental and economic management. For an interim period the authority will negotiate a contract for disposal capacity. After further evaluation, the Authority may consider some operation or program at or adjacent to a closed or closing municipal landfill site. This could range from a simple compost operation to an interim municipal solid waste landfill cell.

The Authority recognizes not only the critical nature of providing a sound solid waste management system, but also of providing opportunities for public involvement and compensation to affected parties. The Authority is committed to an extensive program for public involvement, especially as it relates to the development of a siting methodology. Monitoring and oversight of Authority operations is provided in numerous ways and is welcomed. A comprehensive approach will be implemented for evaluating and then fairly compensating affected property owners, adjacent property owners, and the community "hosting" the major facility. The particular interests and desires of affected individuals and

community representatives will be closely considered by the Authority and will be reflected in all decisions.

Oneida and Herkimer counties are decreasing their reliance on landfilling by moving toward their goal of recycling as much as possible. At the same time, landfill space is rapidly diminishing in the two counties. It is critical that the Authority keep working on developing the new landfill space this area will urgently need, in the future, as part of an integrated solid waste project.

In summary, the Authority is committed to providing an integrated solid waste management system which first maximizes reduction and recycling, is as sensitive as possible to local concerns, is environmentally and economically sound, and is flexible enough to adjust to changing conditions, while at the same time ensuring the proper disposition of all types of solid waste.

* * *

1.6 Public Comment Opportunities

The Oneida-Herkimer Solid Waste Management Authority has provided opportunities for residents of Oneida and Herkimer counties to comment about the two-county solid waste management project during the project's development to date. The Authority is committed to continuing to provide these opportunities, first because it is the proper and responsible course of action, and also because public comment is needed to meet its own objectives, and to comply with the State Environmental Quality Review Act.

The Authority carefully considered public input during the development of the Draft Generic Environmental Impact Statement and Local Solid Waste Management Plan, and provided extensive opportunities for public comment after the release of the DGEIS.

There also were opportunities for comment before the Authority was created through legislation approved in 1988 by the State Legislature, the Herkimer County Legislature, and the Oneida County Board of Legislators.

The earlier opportunities included hearings that were scheduled at the beginning of the work on the DGEIS and the Local Solid Waste Management Plan. On January 7, 1988, a hearing was held to address the overall scope of the solid waste project for Oneida and Herkimer Counties. Later, on July 12, 1988 and July 13, 1988, hearings focused on the question on what scope of issues, including siting issues, should be included in the Draft Generic Environmental Impact Statement. Transcripts of these hearings are available for public use in the office of the Oneida-Herkimer Solid Waste Management Authority.

In 1989, when the Authority assumed responsibility for the project from Oneida and Herkimer Counties, it took steps to provide for public comment opportunities in a number of different forums.

As a result of the Authority's decision to considerably extend the public comment period on the DGEIS, hundreds of residents of the two counties had the opportunity to add their comments, criticisms or recommendations to the public record on that document. During the eight-month public comment period following the release of the document on May 15, 1989, the Authority received approximately 10,000 letters or form letters about the DGEIS and the Local Solid Waste Management Plan.

Some commentors questioned certain sections of the DGEIS, others discussed the impact the solid waste project could have on their property or town. Although the Authority's formal response to these many comments is contained in the Final Generic Environmental Impact Statement, the

Authority also provided answers to the public comments, additional information and resource material wherever possible. Throughout the public comment period, the Authority and its staff provided these responses to inquiries received in person at Authority meetings, at the Authority's office, by phone, or by letter from hundreds of residents.

A number of children from area schools sent letters to the Authority regarding the preliminary landfill sites and incineration. The letters were done by classroom groups apparently in response to topics provided or suggested by their teachers. Most letters expressed strong opposition to a particular candidate site or the concept of landfilling. The letters were reviewed by Authority members and staff.

Complete copies of the children's letters are available for review during business hours at the Authority office.

The Authority demonstrated its commitment to providing public comment opportunities by doing the following, directly or through its staff:

- Setting aside a regular public comment period at each Authority meeting so that members of the public, representatives of area organizations, and outside experts could be heard.
- Holding 15 Authority meetings during the eight-month public comment period. During Authority meetings, which are open to the public and were very well attended, the agendas included topics of interest to area residents, such as discussions of recycling, construction of the Materials Recovery Facility, preliminary hydrogeologic tests, and area landfill capacity.
- Holding more than 10 hours of public hearings on the DGEIS and Local Solid waste Management Plan. On July 11, 1989, the Authority listened to speakers during almost six

hours of its public hearing in Oneida County, held in the City of Utica. On July 13, 1989, the Authority heard comments and information during its hearing at Herkimer County Community College, which lasted approximately four and a half hours.

• Scheduling two additional hearings on certain issues addressed in the DGEIS and Local Solid Waste Management Plan. Those were: the Authority's December 11,1989 hearing at Herkimer County Community College on the Village of Herkimer on the consideration that should be given to agriculture in the siting of solid waste facilities and the Authority's December 18, 1989 public hearing in the City of Rome on the potential role of waste-to-energy in the area's solid waste project.

• Providing two detailed briefings about the development of the solid waste project and the DGEIS at meetings of the Oneida County Environmental Management Council.

• Presenting information and answering questions about the DGEIS and landfill siting issues at the invitation of the Newport Town Board for a meeting held in that town. An estimated 500 people attended the meeting.

• Meeting informally with an ad hoc group of area residents, several of whom live near potential sites listed in the DGEIS, for briefings, discussions and responses to questions.

• Providing a presentation about the proposal contained in the DGEIS and Local Solid Waste Management Plan at the request of the Verona Town Board for its area residents. That presentation included opportunities for questions directed to the Authority's representatives.

• Meeting with representatives of the Trenton Citizens' Advisory committee to discuss the proposal and provide answers to committee member's questions.

• Meeting regularly with solid waste haulers front the two-county area during the development of the DGEIS and Local Solid Waste Management Plan. Those meetings contained lengthy discussions about the whole approach that would be taken to implementing recycling in Oneida and Herkimer Counties.

• Providing presentations for community organizations and service clubs throughout the area about the proposal, including discussions of the solid waste problem facing this area, the role of recycling, the need for waste reduction and the role each citizen can play in solving the problem. The presentations included question and answer periods.

• Providing presentations for school groups in the two counties. As appropriate to a particular grade level, those presentations and the question and answer periods focused on one or more of the following: The importance of recycling, the need for each citizen's participation in recycling, the ability of each student to consider and change his or her own waste disposal habits, the reason for the high priority given to composting of yard waste in the two counties, the strict standards in effect for landfill construction and operation, and the need for waste reduction.

* * *

2.1. Public Involvement

The Authority has a continuing interest and commitment in working with the general public, elected officials, schools and businesses. This ongoing effort has provided two benefits: it better informs the Authority about concerns and interests from various segments of the population and it helps these different segments of the public understand the Authority's work on a long-term, solid waste project.

One of the top priorities for the Authority, since its inception in 1989, has been to recycle as many materials as possible in

the Oneida-Herkimer County area. The Authority is responsible for implementing the solid waste/recycling laws adopted by Oneida County and by Herkimer County in 1988. The Authority also is responsible for constructing and operating the 200 ton-per-day Recycling Center which was begun by the two counties.

Recycling has a key role in the long-range project needed by the area. The more materials that are recycled, the less waste left to be sent a landfill or an energy recovery facility. Other related activities, such as mandatory composting and waste reduction, also are already being used to further this goal.

Public involvement contacts with the various groups have occurred both formally and informally. Now, it is the Authority's intention to establish a formal Recycling Advisory Committee to assist with the important tasks of bringing the Recycling Center on line and adding additional recyclables to the current list of requirements. Those additions will be made possible by the opening of the Recycling Center.

This Recycling Advisory Committee will be comprised of representatives from the two counties. It will help the Authority assess recycling at the local level by providing a vehicle for the continuing exchange of ideas. It will consider ways to increase the volume, ease, and efficiency of recycling both from hauler and resident perspectives.

All Authority actions will comply with the State Environmental Quality Review Act, which guarantees public involvement at the different stages of a project.

* * *

3.1 Observations

A discussion of the basic concept and approaches to waste reduction (and toxics removal) is contained in Section 2.1 of the DGEIS. While there are a limited number of definitive and effective actions which a local jurisdiction can take, the Authority firmly believes that waste reduction must be pursued at all levels. Some actions portrayed as reduction are truly recycling and therefore must be considered differently when developing programs and facilities.

Both the Solid Waste Management Act of 1988 and the New York State Solid Waste Management Plan place waste reduction as the top priority. The Plan targets a 10% reduction level by 1997. Yet, there have not been any major state or federal level policy initiatives aimed at waste reduction. At the local level, it has been difficult to gauge any reduction because of changed collection and disposal practices. Information developed by the New York State Legislative Commission on Solid Waste, "Where Will the Garbage Go" (annual update) indicates that, in fact, more waste is being generated each year on a statewide basis.

This presents a difficult circumstance for the Authority in making long range plans and facility commitments. On the one hand, the Authority puts reduction as the top priority, and the State's 10% goal is reflected in the Authority plan (see Tables 1.7-1 and 1.7-2). On the other hand, there is no evidence that waste volumes are decreasing and no comprehensive state or federal program capable of achieving 10% reduction has even been started. The Authority does not want to make any program or facility decisions which are undersized, if the 10% goal is not achieved. The result would be the landfilling of more raw, unprocessed waste – a result counter to an important Authority policy. Conversely, the Authority does not want to oversize programs or facilities, if the 10% goal is achieved. The result could be the

expenditure of additional capital and possible contractual problems, depending on the method of future facility procurement. Again, arriving at a judgment on this issue is most difficult, because it is nearly entirely a matter not locally controlled.

The Counties and now Authority have initiated numerous procurement and purchasing efforts for paper and other products which affect some level of waste reduction. The Authority has a standing two year program of industrial-commercial-institutional waste audits which promote reduction and recycling. These audits will continue and expand.

The Authority will also continue to emphasize reduction in public education efforts, expanding and building on the current program. In the past year, the following direct efforts were undertaken:

- Using the Reduce, Reuse and Recycle theme in newspaper ads;
- Conducting two television interviews specifically on waste reduction – one interview was on suggestions for reducing and reusing gift wrap, and the other was done in December on ways to reduce holiday waste by emphasizing use of natural materials;
- Printing a third edition of Recycling Our Resources: A Recycling/Solid Waste Curriculum for Kindergarten through Sixth Grade. The Solid Waste Authority's elementary school curriculum includes specific classroom activities on: Reuse, composting, and the correlation between purchase of over-packaged goods and excess waste;
- Using the Solid Waste Authority's Waste Not newsletter to promulgate information about waste reduction, composting and reuse of materials. Recent

issues of the newsletter have done this through articles on: Christmas tree recycling, using the Authority's waste audit service to reduce waste and to recycle, and tips on "Recycling the Holiday Spirit" by emphasizing reduction and reuse. Not only does the newsletter reach area opinion leaders such as all county legislators, mayors, town supervisors and council people, but it also is used to supply information to the general public as handouts during presentations and in response to requests for mailed information.

- Continuing to place strong emphasis on these themes during public presentations by staff, especially presentations to school groups which emphasize everyone's role in producing waste and everyone's responsibility for reducing it.

4.1. Recycling Observations

The DGEIS recommended that in order to achieve the highest feasible level of recycling in the two Counties, local governments, institutions, residents and the private sector would be required to undertake certain responsibilities to assure the program's success.

Efforts to recycle the residential waste stream date back 20 years for some communities in the region. More recently, pilot recycling programs were started by Oneida County in a number of communities in 1987. Oneida County appropriated $150,000 for the implementation of municipal pilot programs intended to provide information regarding the feasibility of various recycling collection methods. The Town of Floyd and the Village of Waterville implemented curb-side collection systems. The Town of Verona established a drop-off center for recyclable material collection. At this writing, all 78 communities in both counties have at least one

year of experience with the mandatory separation and recycling of at least newspaper and glass. The Authority received and marketed these recyclables over the past two years marketed approximately 16,000 tons of material.

In order to provide the legal framework for mandatory recycling, Oneida County adopted a local law in August 1988. Herkimer County enacted a similar law in September 1988. The development of both Solid Waste Laws was guided by several basic principles: the counties and all local municipalities should implement a comprehensive and systematic approach to solid waste management; priority should be given to materials recovery of all categories of waste including green waste, construction and demolition debris, infectious waste, household hazardous waste and solid waste; the reduction in locally available disposal capacity is a direct incentive to recycle and thereby, save space; this commitment to recycling is essential in the region's effort to develop an integrated solid waste management system.

Specific implementation schedules were enacted in conjunction with the local laws. Existing solid waste collection practices, recycling programs, contract periods, land use character, population density, distance between collection stops and municipal budget cycles were all considered. All 78 local governments were required to submit plans to the counties to confirm compliance with the implementation schedule. The two Counties are largely beyond the planning stages and into implementation with respect to recycling. The counties have made the financial commitment to construct a materials recovery facility, identified as the Oneida-Herkimer Recycling Center, to insure a means of processing, and therefore, marketing the full range of recyclables. The waste stream in Oneida and Herkimer Counties is composed of a wide range of materials.

several of which are recyclable with an appropriately designed recycling center.

* * *

6.1 Observations

The need for new landfill disposal capacity remains one of the most critical problems facing the region. Even with the very aggressive recycling program underway, a portion of the waste stream will remain. For the foreseeable future, there will be a need for proper landfill disposal capacity.

The most significant policy developed by the Authority, based upon consideration of public comment and all available information, is that the volume of waste sent to a landfill should be as small as possible. There is a growing body of evidence which indicates that modern landfills store, rather than dispose of, waste. Therefore, each unit of waste placed in a landfill triggers a long (perpetual) process of facility maintenance, monitoring, and possibly remediation. This is reflected in the Part 360 Regulations which require a minimum 30 year post closure plan.

Since the issuance of the DGEIS, the clear trend of closure, by the State, of older, unlined landfills has continued. The only facilities remaining open have a defined capacity and life and with one possible exception, none have any prospect for use as a municipal solid waste landfill beyond the closure date noted below:

Ash Landfill - 1994
Whitestown - January 1991
Webb - January 1992
Mohawk Valley sanitary Landfill (MVSL)- Sept-Dec 1991

This trend creates a significant capacity need, at least part of which will need to be met by some new landfill facility.

It is therefore the finding of the Authority that the identification of a new, long-term landfill site is necessary. This will take a minimum of five years to site, permit and construct which will result in the continued reliance on existing landfill sites or areas adjacent thereto over the five year development time.

The DGEIS identified seven top candidate solid waste management facility sites. The DGEIS recommended that a landfill would be the primary use of one of these sites. The suitability of these sites was addressed in the DGEIS as well as supplemental environmental impact statements which reported test results obtained from sub-surface investigations. These sites were generally not found suitable by the Authority pursuant to its siting criteria. Details of the site investigation can be found in the supplemental impact statements.

The findings from these reports, together with public input received during the public comment period, were the basis for the Authority initiating an inquiry to local officials responsible for closed or closing municipal landfills. The officials were asked if they wished to have the Authority explore, on a preliminary basis, the use of such a site coincident with the closure and remediation of the old area. The basic objective would be to effect some environmental improvement and economic efficiency by conducting the clean-up in a coordinated and integrated fashion with the development of new disposal capacity.

These inquiries were sent to the 12 municipalities with public landfills currently operating or operated since 1970. From these inquiries, the German Flatts Ilion Mohawk (GFIM) landfill board responded positively, as did the Southwest

Oneida County (SWOC) landfill. Officials from Rome also informally responded that they were open to such an evaluation but reserved the prerogative for future review. The Village of Boonville asked to be kept apprised of any further interest in using their closed landfill.

Based on this potential interest, the Authority engaged Geraghty and Miller (G&M) to complete a reconnaissance survey of GFIM, SWOC, and Tannery Road. That report is included as Volume 6 Appendix K herein.

All three landfill sites will require additional study and work to provide for the proper closure compliant with Part 360. The Tannery Road and GFIM landfills are both classified as inactive, hazardous waste sites on the New York State Superfund list. As described in the appendix, this designation initiates a complex characterization, remediation and closure process. Typically, several years and several million dollars worth of technical and construction work are required. Therefore, the DEC's position is that no action (i.e. new landfill development) can be taken which might impair remediation of a hazardous waste site.

Although the SWOC landfill does not have the same hazardous waste site designation, remedial investigative work is still being required by the DEC. The same principle - that no action can be taken which might impair the ability to properly remediate the site - applies to SWOC as well.

With respect to the Mohawk Valley sanitary Landfill (MVSL), the findings to date are contained in a publicly presented report, attached as Volume 6 Appendix J. In this report, potential environmental problems were identified including proximity to the aquifer.

The environmental setting and the regulatory status of all three impacted sites very significantly complicates their future use.

While there are complicating factors with each of these sites, any future reuse or new use of one or more of the sites should not be precluded at this tine. The time necessary to develop a landfill facility on a new site will require the continued use of an existing site or sites for an interim period until a new site can be secured though the process outlined in Section 2.8. with the information and understanding available, at this time, the following observations and findings for each site are as follows:

SWOC — The presence and character of the limestone bedrock along with inadequate cover of low permeability soil does not lend itself to the development of any new landfill capacity for municipal solid waste, ash residue, or construction and demolition debris. This site could receive future consideration for a transfer station, satellite green waste compost area, or other similar use depending upon the interest of towns and villages in the area and the final configuration of the overall system of Authority facilities.

GFIM — The report by Geraghty and Miller identified an area at the top (south end) of the GFIM property which may have some potential for future use. This site warrants ongoing re-examination and consideration as the plan is tine tuned and implemented. Like the SWOC site, some non-disposal use may also be warranted.

Tannery Road — The report by Geraghty and Miller indicated some potentially favorable geologic conditions in the vicinity of the existing Ash Landfill. Remedial work has not yet begun on the old City of Rome Landfill. and therefore, it is not currently possible to ascertain if

some portion of the site might be appropriate for future use. Such future use would depend less on geologic factors and more on the nature and distribution of existing waste and the final remediation plan. As with GFIM, the DEC will not permit any activity which would interfere with site remediation. Based on the identification of favorable geologic conditions, the Authority will consider areas proximate to the existing Ash Landfill for potential use. Such use could include municipal solid waste disposal as well as ash residue disposal, composting and construction demolition debris processing and disposal.

Mohawk Valley Sanitary Landfill - The report by Geraghty and Miller identified a number of concerns with the area east of the existing landfill which is proposed by Waste Management Inc. for a new landfill. Due to these area concerns, the Authority does not consider the area adjacent to MVSL as a long-term landfill site. As noted above there is a need to continue utilizing such a site for an interim period until a new, more suitable, long-term site cap be identified and developed.

6.2 General policies

6.2.1

The amount of unprocessed waste sent to a landfill should be as small as possible. Within feasible engineering and economic limits, the landfill cell area should be kept as small as possible.

6.2.2

The development of new landfill disposal capacity within Oneida-Herkimer Counties to serve Oneida and Herkimer counties is of utmost importance. This is a top priority of the

Authority to ensure capacity when needed and to guard against uncontrollable costs of reliance on long distance (out-of-region) transfer.

6.2.3

The Authority will finalize and apply an appropriate siting methodology (see Section 2.8) for the identification of a new landfill site or sites.

6.2.4

The Authority must move to secure interim disposal capacity until a new, long-tern landfill site can be identified and developed. This will be accomplished through an interim disposal contract, reliance on an existing site, or area adjacent thereto, or some combination thereof.

6.2.5

The Authority recognizes that the transition from existing landfills to new landfills is difficult and expensive, but necessary. The Authority further recognizes that a private landfill may be proposed within this region, such as that by Waste Management Incorporated, which would accept waste from outside Oneida and Herkimer counties. It is a principle and policy of the Authority that any new landfill developed for long term capacity, whether or not for local waste and whether public or private, must be sited, constructed and operated consistent with the approach outlined in Section 8.

6.2.6

Information should be given to municipalities with closed or closing landfills to insure that the maximum funds are obtained for remediation and closure.

6.2.7

The Authority will continue to monitor and document the performance of the liner and leachate collection systems at the ash landfill Old Tannery Road to limit potential liability with respect to the remedial work likely to be required relative to the City of Rome landfill.

6.2.8

The Authority is concerned that all solid waste management activities are conducted in a way that protects groundwater resources. The Mohawk Valley aquifer is seen as especially important due to its high potential yield, proximity to population centers of the region, and the possibility that its utilization in the future will increase. The Authority therefore believes that efforts should be made to fully characterize the aquifer and its recharge areas and to protect it from contamination. The Authority will support such efforts through information dissemination and coordination but not in providing engineering, direct technical assistance, or funding.

6.3 Actions

6.3.1

Identify prime hydrogeologic units (areas with the best overburden, bedrock, and groundwater characteristics with respect to the Part 360 regulations).

6.3.2

Finalize draft siting methodology for public comment--1991. (See Sections Siting 2.8 and Public Involvement 2.1).

6.3.3

Assist with the development of a scope of study necessary to fully document conditions at the MVSL new cell area, to insure aquifer protection and define recharge areas. Encourage the United States Geologic Survey (USGS) to evaluate hydrogeologic conditions and with the DEC to insure regulatory compliance.

6.3.4

Complete the negotiations and finalize the interim disposal contract to provide that service until a suitable alternative is in place.

6.3.5

Conduct the study and evaluation necessary to make a determination on the suitability of any areas in close proximity to the existing Ash Landfill, which demonstrate favorable geologic characteristics, and may be usable for some landfill use as outlined herein.

* * *

12.1 Interim Measures

The Authority currently operates three facilities (the Energy Recovery Facility, the Ash Landfill, and the Recycling Center) and numerous programs to manage solid waste in Oneida and Herkimer Counties. The Recycling Center provides for the processing of the full range of recyclables from mixed household waste and some commercial waste for all of the two-county region. The Energy Recovery Facility and Ash Landfill provide service for about one third of the region's population. The ERF

handles mixed municipal solid waste, primarily from households. Plans for the development of additional facilities and programs to provide for all components of the waste stream for all residents of the two counties are explained in the policy section of the Local Solid Waste Management Plan.

There will be an interim period before additional new facilities and programs can be brought on-line to handle the remaining geographic area and categories of the waste stream not presently being handled by Authority facilities. This interim period will vary, depending upon the type of facility and the particular component of the waste stream. The policy section of the local solid waste management plan is organized in 11 sections with specific policies and actions stated for each section. The Authority is committed to the implementation of these policies and actions. Dates for the implementation of each program and facility are indicated on a section by section, action by action basis.

The following is a brief summary of what will happen to the waste stream targeted for the facilities and programs described in these sections from now until those facilities and programs come on line. This, therefore, indicates the interim measures to be employed by the Authority. (The numbers and titles below correspond to those in the policy section of the LSWMP). The interim disposal contract landfill (IDCL) is explained below.

3. Solid Waste Reduction – this waste stream will continue to go to the ERF or IDCL, hopefully on a diminishing basis.

4. Solid Waste Recycling & Reuse – the Authority is continuing its efforts to increase the volume of material separated from the waste stream for recycling at the Recycling Center, private scrap dealers, and other Authority recycling operations.

Residues and materials not separated for recovery will continue to go to the ERF or IDCL.

5. Solid Waste Processing – the waste targeted for possible new waste processing facilities will continue to go to the ERF or IDCL during the interim period. As noted in the policy portion of the LSWMP, a decision in this regard is planned for mid-1992 with a start-up date in the 1995-96 time frame.

6. Residue Disposal – Non-processed and non-recycled waste generated during the interim period will go to the ERF or the IDCL. Ash residues from the ERF will go to the ALF through 1994 at which time either a new cell will be opened, the ash will be directed to the IDCL, or the ERF will be closed thus eliminating the ash residue as a waste stream. As explained below, the IDCL will be used until a new Authority landfill is opened in 1997.

7. Household Hazardous Waste – In 1991 and 1992 special one-day events will be held to collection and disposal of this material. Pending state direction and approval, the Authority will consider a permanent collection facility after 1992. The Authority spent in 1990 over $250,000 on two one-day events. The cost of the one-day program do not support a long-term commitment to such one-day events.

8. Construction and Demolition Debris – For the interim period, this waste will go to either the Guerriero and Humpf sites under Authority direction. The LSWMP outlines the framework for either private sector or Authority C&D waste processing facilities in the 1992-93 time frame. Some waste may be directed to IDCL during the interim.

9. Regulated Medical Waste – for the interim period waste will be directed to the St. Lukes Hospital facility. Capacity has been confirmed.

10. Wastewater Treatment Sludge – the current practices as recorded in the SLWMP are expected to continue through 1994-95 at which time a long range system will be in place. If necessary, some sludge may be directed to the IDCL during the interim.

11. Transfer stations – these will be developed as the main components of the system are put in place.

In summary, the Authority's programs to increase recycling of every component of the waste stream will continue in earnest. At the same time, it is recognized that certain residues and non-recyclable waste will have to be managed for an interim period.

The Authority has committed to the development of a new long-term landfill site to accommodate the non-recyclable portion of the waste stream. In its recently issued outline for the development and implementation of a siting methodology the authority has estimated it will take approximately six years to complete this process. Therefore, for the period of time over the next six years, the Authority has initiated and at this date nearly completed a process to secure interim disposal services.

In February of 1990 the Authority issued an interim disposal request for proposals pursuant to section 120w of general municipal law. That draft solicitation, published nationally, was to provide services either in a landfill located within the region or some other acceptable facility for a period of time until the Authority could get its own facilities developed. In response to the final RFP, two proposals were received in August of 1990.

Objectives

The interim disposal contract request for proposals was issued by the Solid Waste Authority to secure environmentally sound disposal capacity for the region's waste from the present to the time when the Authority's own long term facilities can be brought on line. (This is estimated to be approximately 6 years). The Solid Waste Authority is wholly committed to the development of facilities within Oneida and Herkimer Counties to provide for the region's long term needs. This RFP for landfill disposal service is of critical importance as recycling and other waste processing systems take full effect as is seen as a temporary measure to provide a transition until a full service system can be put in place. During negotiations, the Authority stipulated that no contractual or other measures would in any way retard or restrict the full and complete development of waste reduction and recycling. That means that the Authority will not guarantee that a minimum tonnage of waste will be delivered pursuant to the interim disposal contract.

* * *

JAMES H. DONOVAN
47TH DISTRICT
CHAIRMAN
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FINANCE
TRANSPORTATION
INSURANCE
MENTAL HYGIENE
STATE-LOCAL RELATIONS

MAR 24 1987

March 19, 1987

Mr. Hans G. Arnold
Commissioner
Department of Solid Waste Management
Oneida County Office Building
800 Park Avenue
Utica, New York 13501

Dear Mr. Arnold/Hans:

Please find enclosed information I thought might be of interest to you.

Sincerely,

/s/

Michael R. Houseknecht
Staff Assistant

MRH/as
Enclosure

BEST AVAILABLE COPY

THE SENATE
STATE OF NEW YORK
ALBANY

MAR 10 1987

MEMORANDUM

MEMORANDUM

TO: Majority Senators

FROM: Joseph L. Bruno, Vice Chairman
Solid Waste Commission

RE: Local "flow control" legislation granting localities authority over the flow of solid waste within their jurisdictions

DATE: March 9, 1987

As a response to New York's well-documented solid waste disposal crisis, local governments across the state are upgrading their solid waste management systems and proposing new facilities to replace capacity lost due to the need to close existing landfills. Many are considering resource recovery facilities as an integral part of their future solid waste management program. These communities will, in turn, be looking to the legislature for specific authority to enact local "flow control" ordinances, which provide a local government with the right to control the disposition of waste within its boundaries. This memo is intended to provide background information on various approaches flow control legislation has taken, and to point out some factors you might wish to consider when local governments in your district request similar legislation.

A flow control ordinance enables a municipality or solid waste authority to control the solid waste generated by or sent into its jurisdiction through directing it to a specified solid waste management facility — in most instances, a resource recovery facility. This is necessary in order for the

municipality to assure that sufficient waste is received at a resource recovery facility to:

(1) cover financing costs;

(2) meet the terms of a "put or pay" contract, under which a financial penalty is incurred if a minimum amount of waste is not received at the facility; and

(3) ensure that energy sales contracted for with other parties can be fulfilled.

For these reasons, bond counsel will insist on flow control authority prior to approving bonds for a specific facility. In addition, specific statutory authority will clarify that municipalities are acting in accordance with a clearly articulated state policy and may thus claim the protection of the state action exemption to the federal antitrust laws.

Recent flow control authorizations have included protection for recycling interests. This is to assure consistency with federal requirements, specifically, Section 4003 of the Resource Conservation and Recovery Act (RCRA). The 1984 amendments to RCRA specify that laws granting local control over the flow of solid waste must not interfere with "present and reasonably anticipated future needs of recycling interests." Further, the federal law implies that adequate provision must be given to these needs when sizing a resource recovery facility.

While there has been some dispute over the actual effect of the federal language on local programs, there is some merit associated with these provisions. Specifically, they protect various industries that may provide important economic contributions (e.g., paper mills); and, they establish a "pro-recycling" approach to solid waste management. Conversely, opposing inclusion of such language presents an *image* of opposing recycling activities, regardless of the underlying rationale.

During the 1985 and 1986 Sessions, the Legislation Commission on Solid Waste Management (LCSWM) attempted to develop generic legislation that would be used for all future flow control bills. Due to differences of opinion over the impact and need for various sections, agreement was not reached on the proposals. However, Assemblyman Hinchey, LCSWM Chairman, had an agreement from Assembly Leadership last year, which I fully anticipate will continue this year, that no flow control bill would pass the Assembly without language protecting recycling interests. Thus, from a practical viewpoint, language affording protection is necessary.

It should be noted here that, when discussing alternative approaches to language providing recycling protection, it is important to keep in mind the frame of reference. Specifically, the level of concern over the degree of protection provided recycling interests over the quantity needs of a resource recovery facility depends on the demographics of the area over which flow control is requested. In a large metropolitan area, where there is a virtually unlimited future supply of solid waste, bond counsels are generally not concerned over strong recycling protection language because there is virtually no likelihood that any level of future recycling activities will remove a sufficient tonnage from the waste stream to threaten a plant's viability. This is particularly true in the New York City and Long Island area. However, in more rural environments with limited future supplies of solid waste strong recycling protection language could potentially prove troublesome. This would be particularly true in cases where any level of future recycling were protected, thereby allowing an unforeseeable quantity to be removed at a future point from the waste stream. Once this amount went beyond that anticipated at the time the plant was designed, the penalty provisions of a put or pay contract could take effect.

The language the Assembly originally insisted on was:

> "Such local law, ordinance, or regulation shall provide, however, that the county, city, town or village will not act in a manner, or enter into any contract, that can be construed as interfering or having the effect of interfering with the implementation of on-going or proposed or reasonably anticipated future source separation, recycling programs, changes to the packaging portion of the waste stream to reduce solid waste generation, and the activities and enterprises of scrap dealers, processors and consumers, and shall also provide for the maximum opportunity for the reclamation and recovery of materials." [emphasis added]

Problems relating to the first underlined section stemmed from the uncertainty of determining what is meant by the phrase "reasonably anticipated future" needs of recycling interests. This was addressed in the Senate version of last year's generic flow control law (S.6599-D) through language that (1) has DEC certify that a municipality has met the requirement to not interfere with recycling; and (2) stipulates that "once a determination has been made that a municipality has properly allowed for such ongoing, or proposed, or reasonably anticipated future solid waste volume reduction programs . . . a municipality shall not be required to accommodate additional volume reduction programs that were not anticipated unless the department finds that such additional volume reduction program would not cause such municipality to suffer a financial loss . . ."

The second underlined language ("shall also provide for the maximum opportunity . . .") presented problems because its intent is redundant so far as protecting recycling activities is concerned, and it appeared to take away the protection offered by the clarification to the first section. Bond counsel

with whom my staff has consulted in developing local legislation have insisted on the removal of this language.

The Assembly has since pursued an alternate approach, which Assemblyman Hinchey used in his Ulster County Resource Recovery Agency bill. This approach does not specifically have language protecting recycling interests; rather, in the section allowing local control over the flow of solid waste, the bill specifies that the term "solid waste" shall *not* include "any scrap or other material of value separated from the waste stream and held for purposes of materials recycling." This approach does not provide *any* protection as far as guaranteeing a minimum flow of waste to a facility in the future, since any amount of materials may be removed at any time in the future so long as it is recycled. While this does not pose a problem in large metropolitan areas, it could present significant difficulties in areas where smaller amounts are generated.

Further, while some bond counsels have reacted favorably to this recent approach to recycling protection language, it should be noted that the burden for meeting conditions in a put or pay contract will fall on the local government that is party to the agreement. Accordingly, county attorneys and other involved officials should carefully review the implications.

My staff is continuing to pursue these issues. I bring these matters to your attention to highlight issues you might wish to keep in mind in the event that your office is developing legislation to meet local flow control needs. As always, I and my staff would be more than happy to answer any questions you might have on this or other solid waste management issues.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY

STATEMENTS OF INCOME AND ACCUMULATED DEFICIT
Years Ended December 31

	2001		2000
OPERATING REVENUES			
Tipping fees	$ 16,322,014		$ 16,071,793
Contract/user fee – City of Utica (Note J3)	1,781,603		1,838,919
Blue bag sales (Note J3)	1,217,360		1,193,040
Recyclable sales	1,225,127		1,574,506
Miscellaneous	397,743		334,891
	20,943,847		21,013,149
OPERATING EXPENSES			
Landfill tipping fees	11,367,090		11,029,788
Personal services	2,401,303		2,211,612
Contractual services	1,768,965		1,888,190
Materials and supplies	325,098		386,835
Utilities	283,040		247,899
Repairs and maintenance	69,742		83,806
Insurance	112,871		111,399
Other rental	58,574		108,394
Depreciation (Note A5)	1,289,680		1,216,241
Miscellaneous	718,620		631,471
	18,394,983		17,915,635
Operating income	2,548,864		3,097,514
NONOPERATING REVENUES (EXPENSE)			
Interest income	753,489		853,990
Interest expense	(2,308,384)		(2,424,449)
Amortization of bond issuance costs	(246,437)		(252,615)
Operating grants	175,192		91,010
	(1,626,140)		(1,732,064)
Net income	**922,724**		**1,365,450**
ACCUMULATED DEFICIT, beginning of year	(11,522,653)		(12,888,103)
ACCUMULATED DEFICIT, end of year	**$ (10,599,929)**		**$(11,522,653)**

The accompanying Notes to Financial Statement are an integral part of these statements.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY

NOTES TO FINANCIAL STATEMENTS
December 31, 2001 and 2000

NOTE A -- SUMMARY OF ACCOUNTING POLICIES

1. Organization

The Oneida-Herkimer Solid Waste Management Authority (Authority) was created September 1, 1988, as a public benefit corporation under New York State Public Authorities Law §2041, Title 13-AA Chapter 747 of the Laws of 1987 by the New York State Legislature with powers to construct, operate, and maintain solid waste management facilities for the benefit of Oneida and Herkimer Counties (the Counties). As of December 31, 2001, the Authority owns eight facilities, the Western Transfer Station (WTS), the Eastern Transfer Station (ETS), Materials Recovery Facility (MRF), Ash Landfill (ALF) (closed during 1998), Green Waste Compost Site (GWC), Household Hazardous Waste Facility (HHW), the Webb Transfer Station, and the Stump Disposal Facility.

* * *

SOLID WASTE TRANSPORTING AND DISPOSAL AGREEMENT

THIS SOLID WASTE TRANSPORTING AND DISPOSAL AGREEMENT (the "Agreement") made and entered into as of the 30th day of November, 1998, by and between High Acres Landfill and Recycling Facility, a division of Waste Management of New York, L.L.C., a Delaware Corporation, with the division office situate at 425 Perinton Parkway, Fairport, New York 14450, and the corporation office situate at 101 Ontario Street, East Rochester, New York 14445 (the "Contractor"), and the Oneida-Herkimer Solid Waste Management Authority, with its office situate at 1600 Genesee Street, Utica, New York 13502 (the "Authority").

RECITALS:

WHEREAS, the Authority is authorized by Section 2049-ee of the Oneida-Herkimer Solid Waste Management Authority Act, New York Public Authorities Law, Article VIII, Title thirteen-FF (1987) (the "Act") to collect, receive, extract, transport, dispose of, sell, store, convey, recycle, and deal with in any lawful manner and way, solid waste and any products or by-products thereof, on such terms and in such manner as the Authority may deem proper; and

WHEREAS, the Authority is enabled by the Act and by Agreement with the County of Oneida and the County of Herkimer to designate by lawful procedure the site or sites for disposal of solid waste generated within the two Counties; and

WHEREAS, the Authority and the Contractor desire to enter into an agreement whereby the Contractor will receive at the Authority Eastern Transfer Station, Albert Schuler Memorial Highway, Utica, New York and at the Authority Western Transfer Station, Route 365, Rome, New York, (the "Transfer Stations") non-recyclable solid waste generated

within Oneida County and Herkimer County and the Contractor will transport such non-recyclable solid waste to its disposal facility known as the High Acres Landfill at Fairport, New York or such other Authority approved solid waste disposal facility, and the Contractor will dispose of such non-recyclable solid waste at its High Acres Landfill or such other Authority approved solid waste disposal facility which is authorized and legally permitted to operate under all applicable federal, state and local laws; and

WHEREAS, the Authority has agreed to pay the Contractor for such transportation and disposal services in accordance with the terms of this Agreement;

NOW, THEREFORE, in consideration of the premises and of the mutual obligations undertaken herein, the Contractor and the Authority agree as follows:

ARTICLE I - DEFINITIONS

Section 1.01 Definitions. For purposes of this Agreement, the following words and phrases shall be given the respective interpretations and meanings set forth below.

"Agreement Date" means November 30, 1998.

"Alternate Landfill" means any duly licensed or permitted solid waste disposal facility, other than the High Acres Landfill and Recycling Facility at Fairport, New York, owned and operated by the Contractor or its affiliated company, and approved by the Authority, upon a written request by the Contractor. Such request by the Contractor shall be made only in the event of conditions caused by uncontrollable circumstances as defined herein.

"Authority Hauler(s)" means any Person permitted by the Authority to deliver solid waste to the Authority's Transfer Stations.

"Authority Transfer Stations" means the Eastern Transfer Station owned by the Authority and located on Albert

Schuler Memorial Highway, Utica, New York and the Western Transfer Station owned by the Authority and located on New York State Route 365, Rome, New York.

"Authority Uniform Tracking Document" means a document prepared by the Authority, completed by. the generator, and delivered to the. Contractor with the applicable load of solid waste (with copies for the waste generator and the solid waste disposal facility) which provides a verifiable record of, but not limited to, waste profile/type, waste generator, county of origin, non-hazardous certification, waste hauler, waste disposal facility and corresponding dates of shipment and receipt.

"Billing Period" means each calendar month in each. Billing Year.

"Billing Year" means each twelve month period commencing on December 2nd of each succeeding year during the term of this Agreement; provided, however, that the first Billing Year shall commence on the first day of the first month following, the Commencement Date.

"Business Day" means each Monday, Tuesday, Wednesday, Thursday, Friday, and Saturday which is not a Legal Holiday.

"Change in Law" means either (a) the enactment, adoption, promulgation, modification or repeal, after the Commencement Date of this Agreement, of any Federal or State law or regulation, County or other local law or, ordinance, code, rule or regulation, Authority action, rule or regulation, or other legislation or regulation which establishes requirements affecting the collection, processing, transporting and/or disposal of solid waste which are more burdensome than the most stringent requirements in effect in the State of New York on the Commencement Date for this Agreement, or (b) the imposition, after the Commencement Date for this Agreement, of any conditions in the issuance or

renewal of any official permit, license or approval necessary for operation of the Authority's two transfer stations or the Contractor's solid waste disposal facility(ies) or with respect to the disposal of Authority waste, which are more burdensome than the most stringent requirements in effect on the contract date. In no event shall a change in federal, state or local tax law be considered a change in law.

"Commencement Date" means the date December 2, 1998.

"Contractor" means Waste Management of New York, L.L.C., with its corporate office at 101 Ontario Street, East Rochester, New York, 14445 and its High Acres Landfill and Recycling Facility division office situate at 425 Perinton Parkway, Fairport, New York 14450.

"Contractor Fault" means the unexcused nonperformance or malperformance by the Contractor or the negligent or willful act or omission of an agent or employee of the Contractor under this Agreement.

"Counties" means the County of Oneida and the County of Herkimer, in the State of New York.

"DEC" means the New York State Department of Environmental Conservation and/or its successor.

"Event of Default" means a failure of either party to this contract to perform any term or condition of this contract on its part to be performed.

"Disposal Facility" means the High Acres Landfill or other permitted solid waste disposal facility owned and operated by the Contractor or its affiliated company, approved by the Authority, and meeting all the terms and conditions herein.

"Hazardous Waste" means any material, substance or waste which, as of the Agreement Date and by reason of its composition or characteristic, is (a) toxic or hazardous

substance or material as defined in the Solid Waste Disposal Act, 42 U.S.C. §§6901 et seq., section 6(e) of the Toxic Substances Control Act, 15 U.S.C. §2605(e) or the New York Environmental Conservation Law, §27-0701-0703 (McKinney 1984), as any such provisions are replaced or amended, and regulations promulgated and finalized thereunder or (b) special nuclear material, source material, or by-product material within the Atomic Energy Act of 1954, as amended. If any governmental agency or unit now or hereafter having appropriate jurisdiction shall identify as hazardous waste a material, substance or waste which was not, as of the Agreement Date, identified as a hazardous waste, then such material, substance or waste shall be considered a hazardous waste for purposes of this Agreement as of the effective date of any such determination.

"Infectious Waste" means the definition contained in New York State Public Health Law 1389 AA-GG.

"Legal Holiday" means New Year's, Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day.

"Party" or "Parties" means either or both the Contractor or the Authority, as the context appears.

"Person" means any individual, corporation, partnership, joint venture, association, joint-stock company, trust, unincorporated organization, or government or any agency or political subdivision thereof.

"Residual Waste" means any material which meets the definition of "Solid Waste" herein but which, due to either its characteristics or handling requirements, is designated by the Authority or Contractor as better managed separate and segregated from other solid waste and which, therefore, will not be delivered to one of the Authority Transfer stations, but may be delivered to the Disposal Facility directly from the point of generation.

"Residue" means the material which remains after solid waste is incinerated.

"Scale" means the Authority's scales located at its two transfer stations.

"Schedule" means any exhibit or schedule attached hereto and incorporated in this Agreement, unless otherwise expressly indicated by the terms of this Agreement.

"Section" means a section of this Agreement.

"Service Fee" means the cost per ton payable by the Authority to the Contractor for the transporting and disposal of solid waste received at the two Authority Transfer Stations.

"Solid Waste" has the meaning specified in 6 NYCRR Part 360 as amended or replaced; in addition, it means all nonrecyclable solid waste (less unacceptable waste) received at the Transfer Stations, inspected by the Authority, sorted as required by this Agreement and/or where appropriate, and loaded onto transfer trailers to be transported by the Contractor to the Disposal Facility.

"State" means the State of New York and all of its appropriate administrative, contracting and regulatory agencies and offices.

"Ton" meaning two thousand (2,000) pounds.

"Unacceptable Waste" means hazardous waste, and radioactive materials, and such other material, substance or waste identified by a governmental agency or unit as hazardous waste, or identified as unacceptable for disposal in a New York State permitted landfill under Federal or State Law, Rule or Regulation.

"Uncontrollable Circumstance" means any act, event or condition, other than a labor strike, that has had, or may reasonably be expected to have, a direct material adverse

effect on the rights or the obligations of a Party under this Agreement, or a direct material adverse effect on the operation of the Transfer Stations and the Disposal Facility or on the delivery of solid waste to the Disposal Facility, if such act, event or condition is beyond the reasonable control of the Party relying thereon as justification for not performing an Obligation or complying with any condition required of such Party under this Agreement. Such acts or events shall include, but shall not be limited to, the following:

(a) an act of God (except normal weather conditions for the geographic area of the Facility), hurricanes, tornados, epidemic, landslide, lightning, earthquake, flood, fire or explosion or similar occurrence; or an act of the public enemy, war, blockade, insurrection, riot, general unrest, or restraint of government and people, civil disturbance or similar occurrence;

(b) the order, or injunction and/or judgment of any federal, state or local court, administrative agency or governmental body with jurisdiction over the performance of either Party's obligations under this Agreement; excepting decisions interpreting federal, state and local tax laws; provided that such order or judgment shall not be the result of the negligent or willful action or inaction of the Party relying thereon, and neither the contesting in good faith of any such order or judgment nor the failure to so contest such order or judgment shall be construed as a willful or negligent action or inaction of such Party; and

(c) a Change in Law.

(d) suspension, termination or interruption of utilities, water and sewer lines and power transmission lines to the Transfer Stations or the Disposal Facility (for reasons other than Contractor Fault) which are required for and essential to the operation of the such facilities.

"Week" means a period commencing Sunday at 12:01 a.m. and ending on midnight of the following Saturday.

* * *

ARTICLE III - DELIVERY AND DISPOSAL OF SOLID WASTE

Section 3.01 Overall Responsibilities.

(a) The Contractor shall accept, receive, transport and dispose of all solid waste generated in Oneida County and Herkimer County, delivered to the Transfer Stations and loaded by the Authority into Contractor's or its sub-contractor's transfer trailers; and the Contractor shall also accept any Residual Waste, Construction and Demolition Debris and Contaminated Soil coordinated through the Authority and delivered directly from the point of generation in Oneida County and Herkimer County to the Disposal Facility.

(b) Contractor shall not knowingly accept, receive and dispose of any solid waste generated in Oneida County and Herkimer County that is not delivered directly through the Transfer Stations to the Disposal Facility, except for Residual Waste, Contaminated Soil, and Construction and Demolition Debris coordinated through the Authority.

(c) Contractor shall provide all necessary tractors and transfer trailers to receive at the Transfer Stations and transport such solid waste to the Disposal Facility.

(d) Contractor shall unload the transfer trailers at the Disposal Facility and properly dispose of such solid waste in conformance with all applicable regulations and accepted operating practice.

(e) The Contractor shall obtain and maintain all necessary licenses and permits in order to enable it to

perform its obligations under subsection (a) of this Section 3.01 and elsewhere in this Agreement.

Section 3.02 Commencement Date; Notice of Site Change; Receiving Time.

(a) Provided that the conditions precedent set forth in Article II have been met, the Commencement Date shall be 12/2/98. If the conditions precedent are not met on or before such date, and the Authority elects to extend the date by which the conditions precedent must be met pursuant to Article II, the Commencement Date shall be the 14th day (unless such 14th day is not a Business Day in which case the applicable day shall be the first Business Day following such 14th day) following the date on which the conditions precedent are met.

Section 3.03 Weighing of Solid Waste; Weigh Scale Records.

(a) The Authority shall operate and maintain weigh scales located at the Transfer Stations, and the weigh scale records for the purposes of determining the total tons of solid waste loaded on transfer trailers leaving the Transfer Stations, and for all billing.

(b) Disputes with respect to the occurrence of weigh scale records shall be resolved pursuant to the provisions of Article VIII.

Section 3.04 Authorized Rejections.

a) the Authority shall have the obligation to reject deliveries of Unacceptable Waste received at the Transfer Stations by or on behalf of the Authority.

(b) the Contractor shall have the right to reject deliveries of Unacceptable Waste at the Transfer Stations or at its Disposal Facility.

Section 3.05 Unauthorized Rejections.

(a) If the Contractor rejects solid waste delivered to the Transfer Stations and/or at the Disposal Facility for any reason other than those set forth in Section 3.04, the Authority shall not be required to pay the Service Fee to the Contractor with respect to such solid waste; and the Contractor shall be obligated to pay the Authority for direct and reasonable costs incurred by the Authority, to the extent of cost substantiation, for the total of the transportation and waste disposal charges per ton incurred by the Authority which are in excess of the waste disposal fee portion of the Service Fee for each such ton if the rejection occurs at the Disposal Facility.

Section 3.06 Authority Approved Disposal Facility. The Contractor shall request approval from the Authority for any alternate Disposal Facility. It is hereby recognized and agreed by the Authority and by the Contractor that the Contractor may utilize the Alliance Sanitary Landfill in Taylor, Pennsylvania for disposal of waste from the Transfer Stations. There shall be no addition to the service fees herein. Any further requests shall be made only in situations arising from uncontrollable circumstances. In such instance, the Authority shall be obligated to pay the Contractor the Service Fee only, even if the Contractor incurs additional costs.

ARTICLE IV - SERVICE FEE

Section 4.01 Service Fee.

(a) Collection. On and after the Commencement Date and for the term of this Agreement, the Authority shall pay the Service Fee to the Contractor on a monthly basis and within thirty (30) days upon receipt by the Authority of the Contractor's invoice.

The Contractor shall provide the Authority with a statement together with each payment request (invoice) pertinent to such Billing Period. The statement shall set forth the number of tons of solid waste loaded on transfer trailers

at the Transfer Stations and delivered to the Disposal Facility and the Service Fee due the Contractor based on the weights recorded at the Authority's scales. The statement shall also include a copy of all Tracking Documents and the weigh scale records for such Billing Period.

(b) The Service fee shall be per ton of solid waste received by the Contractor at the Transfer Stations and shall include transport and disposal of such solid waste to the Disposal Facility.

(c) Service Fee Schedule

	1999	2000	2001	2002
Solid Waste	$43.50	$43.50	$46.00	$47.00

Note: The two categories below are for wastes delivered directly to the High Acres Landfill. The Service Fees do not include transportation; the Service Fees are for disposal only.

	1999	2000	2001	2002
Residual Waste	$35.00	$35.00	TBD	TBD
Construction & Demo. Debris	$30.00	$30.00	TBD	TBD
Contaminated Soil	$25.00	$25.00	TBD	TBD

ARTICLE V - OPERATION OF TRANSFER STATIONS

Section 5.01 Transfer Station Operations

(a) Discharge and Inspection of Waste. After receiving waste at the Transfer Stations, the Authority shall inspect and remove Unacceptable Waste on the tipping floor, sort the solid waste where appropriate, and load the solid waste onto the Contractor's transfer trailers at the Transfer Stations.

Unacceptable Waste shall be reloaded onto the collection vehicle which deposited such material on the tipping floor.

(b) Loading of Waste. The Authority shall gather the solid waste from the tipping floor of the Transfer Stations and load it into the Contractor's transfer trailers in minimum loads of 19 tons per trailer (as averaged on a quarterly basis) for shipment to the Disposal Facility; transfer trailers shall be fully tarped before departure to the Disposal Facility.

(c) Weighing of Transfer Trailers. The Authority shall cause each loaded transfer trailer to be weighed on New York State certified scales located adjacent to the Transfer Stations before departure from the Transfer Stations, to determine the tonnage of waste delivered to Contractor at the Transfer Stations and disposed at the Disposal Facility. Billing will be based on Authority scale records maintained at the Transfer Stations.

(d) Staging Area. The Authority shall provide to Contractor reasonably sufficient staging areas at the Transfer Stations to allow for temporary parking of tractors and transfer trailers as necessary for Contractor's performance under this Agreement prior to departure to the Disposal Facility and after their return to the Transfer Stations.

(e) Transport of Trailers. Contractor will transport or cause its Authority approved sub-contractor to transport all loaded transfer trailers to the Disposal Facility and Contractor will return or provide for the return of the transfer trailers to the Transfer Stations for staging and reloading of solid waste.

(f) Equipment. The Contractor shall procure and maintain at its expense all necessary equipment to transport the solid waste to the Disposal Facility, and to dispose of the solid waste at the Disposal Facility. Based on the Contractor's knowledge of the Authority system and the Contractor's knowledge of the volumes of waste received at

the Transfer Stations, and based upon ongoing coordination with the Authority staff, the Contractor shall at all times maintain and have available adequate numbers of tractors and transfer trailers to receive and remove daily all solid waste delivered to the Transfer Stations. This shall include an adequate number of stand-by transfer trailers to insure: (1) continuous loading during regular hours of operation, (2) removing all waste from the transfer stations by the end of the regular operating day, (3) ability to meet daily and seasonal fluctuations in waste volume. All equipment provided by the Contractor shall be Used and operated by the Contractor in accordance with safe, accepted, and standard practice.

(g) Hours of Operation. Current hours of operation for the Eastern Transfer Station are 5 a.m. - 4 p.m. M-F, 7 a.m. - 8 a.m. Saturday, and for the Western Transfer Station the hours of operation are 8 a.m. - 4 p.m. M-F, and 8 a.m. to 12 p.m. Saturday. The Authority reserves the right to make adjustments to these hours of operation as necessary, with the prior written consent of the Contractor, which shall not be unreasonably withheld. The Contractor and its sub-contractor shall have the right to enter the Transfer Stations' staging areas prior to and after the aforesaid operating hours as necessary for the return and pick-up of empty arid loaded transfer trailers, and the Authority shall provide such access as necessary.

(h) Utilities. Electricity, gas and water used at the Transfer Stations shall continue to be separately metered and billed in the name of the Authority who shall be responsible for the payment of all invoices for these services.

Section 5.02 Use of the Transfer Stations

(a) The Authority shall keep the Transfer Stations open for receiving solid waste during the hours of operation, excluding legal holidays. Subject to applicable state

regulations and/or conditions contained in any permit issued thereunder, or conditions contained in any labor agreement, the Authority may receive such solid waste at the Transfer Stations at additional times and in such cases the Authority will notify the Contractor in advance.

(b) Contractor may use the Transfer Stations for the performance of its respective services under this Agreement but only for such services. If not previously terminated under Article IX of this Agreement, Contractor's use of the Transfer Stations shall terminate at the end of the term of this Agreement or any extension thereof.

(c) Title to the Transfer Stations shall remain in the name of the Authority.

(d) Contractor shall not encumber the Transfer Stations with any liens and encumbrances and, except as otherwise authorized by this Agreement, Contractor shall not remove or damage any part of the physical structure of the Transfer Stations, or permit the use of the Transfer Stations or any part thereof by others, except as may be authorized by the Authority.

(e) Contractor shall not construct or install any capital improvement or make any structural alterations in the Transfer Stations without the advance written approval of the Authority. Capital improvements or structural alterations as used herein means any alteration or improvement to the structure of the building or the surrounding real property that, after completion, cannot be removed without substantial loss of value or major damage to the premises.

(f) The Contractor shall, at all times, have access to the Transfer Stations for the performance of Contractor functions on a non-interference basis.

Section 5.03 Maintenance of Transfer Stations

(a) The Authority shall maintain the Transfer Stations, the scales and the operating permit in a manner to fulfill its obligations under this Agreement.

(b) The Contractor shall utilize the Transfer Stations in a manner so as to cause no damage or degradation to the facilities and the Authority and the Contractor shall on a daily basis return the areas of the transfer stations used by the Authority and the Contractor to a clean and usable condition.

(c) The Authority shall be responsible for snow and ice removal, facility and scale operating conditions, grounds maintenance, mud and dust control and removal of litter outside the Transfer Stations.

(d) The Authority shall be responsible for payment of leachate disposal costs at the two transfer stations.

Section 5.04 Operation of Transfer Stations by Contractor

Contractor shall assume all tipping floor and trailer loading operations at the Transfer Stations, upon ninety (90) days written notice from the Authority. Contractor shall provide its own equipment and labor in the performance of such operations. The Authority shall pay Contractor for its performing such operations at the rate of Two Dollars ($2.00) per ton of solid waste loaded into the transfer trailers at the Transfer Stations; in the event, however, the solid waste loaded into the transfer trailers at the Transfer Stations during the first and successive twelve (12) month annual period after the Contractor's assumption of such operations shall be less than 150,000 tons, then the authority and Contractor shall agree on a fair increase in the rate per ton charged over such and such subsequent twelve (12) month period to fairly compensate Contractor for its assumption of such operations.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

EXPERT REPORT OF MARK P. BERKMAN

I. Introduction

1. I am an economist and Vice President at Charles River Associates (CRA), a firm of consulting economists located in Oakland, California. I earned my bachelor of arts degree in urban affairs and economics from George Washington University in 1975, a Masters degree in urban planning and policy analysis from Harvard University in 1977, and a Ph.D. in public policy analysis from the University of Pennsylvania's Wharton School in 1991. Before joining CRA in 2002, I was employed by National Economic Research Associates (NERA). At NERA, I served as vice president from 1993 to 2002, a senior consultant from 1987 to 1993 and as senior analyst from 1983 to 1987. Before joining NERA in 1983, I served as a budget and policy analyst at the Congressional Budget Office (1977-1980) and as a research fellow at the University of Pennsylvania (1980-1983). I am a member of the American Economic Association, the Association for Public Policy Analysis and Management, the Association of Environmental and Resource Economists and the Western Economic Association.

2. During the course of my career, I have frequently studied solid waste management issues, including disposal capacity, market definition, pricing, environmental and economic impacts, and the

impacts of flow control. My clients in these matters have included public agencies such as the New York City Sanitation Department, the Oregon Department of Environmental Quality, the Alameda County (California) Solid Waste Management Authority, the Solano County (California) Department of Environmental Management, and the Maryland Attorney General's Office. I also have conducted studies and testified on behalf of private sector clients in the solid waste industry, including American Waste, Browning Ferris Industries, Landfill & Resource Recovery Inc, Superior Waste, Norcal, and Randy's Sanitation.

3. CRA charges clients $400 per hour for my services. A copy of my *vita* is attached as Exhibit 1.

II. Purpose and Summary of Opinion

4. I was asked by Plaintiffs' counsel to opine on the application of the *Pike* balancing test, set out by Justice Stewart in *Pike v. Bruce Church Inc.*, 397 U.S. 137, 90 S.Ct. 844 (1970), to the solid waste flow control laws enacted by Oneida County and Herkimer County, New York.

5. The balancing test was explained by Justice Stewart, at 397 U.S. 142, 90 S. Ct. 847, as follows:

> Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule can be phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden on commerce is clearly excessive in relation to the putative local benefits. . . If a legitimate public purpose is

found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and whether it could be promoted as well with a lesser impact on interstate activities.

6. Applying the *Pike* test requires that I address the following questions:

   - Do the Oneida County and Herkimer County local solid waste flow control laws adversely affect interstate commerce?
   - What was the public purpose behind and what local benefits actually result from the Counties' solid waste flow control laws?
   - Is the resulting burden on interstate commerce clearly excessive in relation to the local benefits?

   In brief, I have determined in my professional opinion that the local flow control laws of Oneida and Herkimer County have an adverse effect on interstate commerce. Further, I have concluded that the sole purpose for and benefit derived from the Counties' local solid waste flow control laws is financial, and that the actual local benefits can be achieved by alternative means that impose little, if any, burden on interstate commerce.

7. I provide detailed support for these conclusions below. First, I present a brief history of the local flow control laws enacted by Oneida and Herkimer Counties. Second, I review the impacts the local solid waste flow control laws have and will have on interstate commerce. Third, I discuss the common justifications for flow control. Fourth, I review the purposes behind and the resulting benefits from the Counties' flow control laws in the context of these

common justifications. Fifth, I review the local benefits that the Counties contend justify the local flow control laws. Sixth, I review the alternatives available to the Counties. Finally, I provide a list of the materials that I considered in forming my opinions.

III. A Brief History of Oneida and Herkimer Counties' Local Flow Control Laws

8. "Flow control" – in this instance, a statutory mandate that haulers transport solid waste to County designated facilities only – was initiated in Oneida County, New York, on August 8, 1988 per Oneida County Local Law No. 1 of 1988.[1] The documents I reviewed indicate that the flow control provision was inserted into the original draft of the proposed Local Law, which focused on the issue of recycling, at the suggestion of the Commissioner of the Oneida County Department of Solid Waste Management. The Commissioner had previously been advised and informed of the critical role "flow control" in the bonding of costs associated with large capital solid waste project expenditures.[2]

9. Herkimer County, New York followed suit and enacted a combined recycling/flow control law in September 1988.

10. The Oneida-Herkimer Solid Waste Management Authority was created on September 1, 1988. The

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1 Affidavit of Robert F. Julian, Ex. J-11 (July 5, 1995).

2 Julian Affidavit, ¶¶ 45-48; Ltr. from H. Arnold to R. Julian, February 10, 1988; Memorandum from Joseph L. Bruno, State Senator and Vice Chairman, Solid Waste Commission to Majority Senators, March 9, 1987 attached to ltr from M. Houseknecht to H. Arnold, March 19, 1987; Barton & Loguidice, P.C., "Solid Waste Management: Eastern Oneida and Herkimer Counties. Final Draft Report, Long Range Alternatives" June 1986.

enabling legislation granted the Authority the power "to collect, receive, extract, transport, process, dispose of, sell, store, convey, recycle, and deal with, in any lawful manner and way, solid waste generated within the area of operation in any products or by-products thereof." N.Y. Public Authorities Law, §2049-ee(4). The enabling legislation also granted "to the counties and all other municipalities within the area of operation [of the Authority] . . . the power to adopt and amend local laws . . . requiring that all solid waste generated, originated or brought within their respective boundaries be delivered to a specified solid waste management-resource recovery facility." N.Y. Public Authorities Law, § 2049-tt(3).

11. The Oneida-Herkimer Solid Waste Management Authority Act (the "Act") was the result of a joint request by Oneida and Herkimer Counties. Similar to Oneida County Local Law No. 1 of 1988, the Act, which primarily focuses on "the proper management of solid waste . . . necessary to protect public health and the environment," originated as two separate and distinct proposals. The first proposal concerned the creation of a solid waste management authority; the second proposal was a request for authorization to enact flow control legislation,[3] an anticipated bond counsel requirement, and to address potential concerns over federal antitrust laws.[4]

12. Subsequent to September 1, 1988, the proponents of the Act acknowledged that "a specific objective was to alleviate the County tax burden"[5] and that "[t]he

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3 Ltr. from R. Julian to Senator Hoffman, November 1, 1987.

4 Memorandum from Joseph L. Bruno to Majority Senators, March 9, 1987.

5 H. Arnold memorandum to Oneida County Executive and R. Julian, January 4, 1989.

ability to finance and then operate [the Authority] facilities depends upon the legal commitment of the [Counties'] waste."[6] The financial component was also emphasized by State Senator Donovan, in his March 3, 1988 memorandum of support, which stated that "capital expense and its potential impact on the constitutional debt limit support the creation of an authority."

13. Following the creation of the Authority, the Counties rescinded the local laws of 1988 and replaced them with the modified and amended versions of the law that are the subject of the pending litigation,[7] namely: Oneida County Local Law No. 1 of 1990 and Herkimer County Local Law No. 1 of 1990 (the "Flow Control Laws"). The Counties contracted with the Authority for the management of all solid waste and recyclables and in turn agreed to direct and/or deliver all solid waste and the majority of recyclables that originate in the Counties to the Authority. The Counties also leased and/or sold all their existing solid waste management facilities under construction to the Authority.

14. The Authority assumed the existing debt of the solid waste management facilities leased and/or purchased from the Counties, aggressively pursued a two-county recycling program, commenced the on-going process of permitting a new solid waste landfill in 1991, and executed contracts for the sale of recyclables and the disposal of solid waste.

15. The geographic scope of the Authority is over 2,600 square miles, which encompasses both Oneida and

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[6] Oneida County Executive Statement Re: Contractual Relationship between the Counties and the Authority, November 7, 1988.

[7] R. Julian Ltr. to Oneida County Attorney, September, 1989.

Herkimer Counties. Seventy-nine (79) different cities, towns and villages are located within the Counties. Even today, only nine of the seventy-nine provide municipal waste collection services.[8]

IV. The Local Flow Control Laws' Impact on Interstate Commerce is More than Incidental

16. The Counties' Flow Control Laws affect more than approximately 200,000 tons of solid waste annually. Under these laws, virtually all of this waste is required to be collected and delivered to facilities designated by the Oneida-Herkimer Solid Waste Management Authority. Pursuant to the Authority's integrated waste management plan, all such facilities are to be located within the two Counties. There is ample evidence (discussed below) that absent the Counties' Flow Control Laws, this waste would be transported, processed and disposed of in the interstate solid waste market, as is waste generated elsewhere in upstate New York and throughout the United States.

17. First, because the Authority has not yet sited its proposed landfill, the Authority has been forced to turn to the interstate market itself. The Authority issued requests for proposals from private waste management firms starting in May 1990. This led to a contract with an out-of state waste facility through 1998. Between December 1991 and December 1998, the Authority shipped virtually all of the non-recyclable waste generated in the Counties to the Empire Landfill in Taylor. Pennsylvania. Even when the Authority rebid for services in 1998 and chose a contractor with a landfill located in New York State

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[8] Defendants' Response to Plaintiffs' Second Set of Interrogatories, number 11.

(but outside the Counties), the presence of an interstate market was readily apparent. Another bidder had an out-of-state facility, and the selected contractor ultimately designated a backup landfill located in Erie, Pennsylvania. This interstate presence brings price discipline to in-state bidders and demonstrates the interstate nature of the solid waste disposal market. Thus, the Counties and the Authority have participated in and benefited from the very interstate market from which the Authority plans to withdraw.

18. Second, while the Authority's present interim program allows out-of-state disposal site providers to compete periodically for the Counties' waste and for haulers to compete for delivery to the Authority's facilities, interstate competition is not at the level that would be expected in the absence of flow control. Absent flow control, it is likely that more out-of-state landfills, incinerators, and haulers would be involved in handling waste generated in the Counties. There is strong evidence that this is the case. The geographic scope of the market as indicated by bids received by the Authority puts landfills or waste to energy facilities in Connecticut, Rhode Island, New Hampshire, Pennsylvania, New Jersey, Massachusetts and Vermont in play as potential recipients of the solid waste generated in the Counties. (See Exhibit 2).

19. Although out-of-state disposal firms have some access to waste from the Counties through the Authority's interim periodic bidding process, more landfills would be involved absent the single point of access created by the Flow Control Laws. In addition, waste haulers are restricted from fully participating in the interstate market. For example,

several of the plaintiffs have identified out-of-state landfills that they either had used or were approached by before the Counties' Flow Control Laws were enacted.[9] Plaintiff Levitt identified the Chambers Landfill in Millersburg, Pennsylvania, and a landfill in Virginia as economic alternatives to the Authority's designated facilities. Plaintiff Bliss had contracted with a landfill in Ohio for construction and demolition waste as an alternative. Plaintiff Guerriero identified the Greentree Landfill in Pennsylvania as an alternative. As shown in Exhibit 2, this supports an even more expansive interstate market than the Authority bid records, adding Ohio, West Virginia, Virginia, Maryland and Delaware. The Flow Control Laws clearly prevent local haulers from benefiting from the highly competitive interstate solid waste disposal market and impose substantial costs on these haulers. For example, the Flow Control Laws require multi-county haulers who seek to operate in interstate markets to separate waste by county of origin. This imposes the burden of additional record keeping. It often forces haulers to create inefficient collection routes and purchase or retain additional equipment or employees. As a result, economies of scale in transport are often lost.

20. The Counties' Flow Control Laws also buck the trend toward large regional waste markets, which frequently extend into several states. As discussed below, changes in regulation and industry structure have led to wide geographic markets served by large regional landfills. Consequently, the efficient economic management of solid waste will only conform to local and state governmental boundaries by happenstance. Thus, and perhaps most

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[9] Affidavits of Levitt, Bliss, and Guerriero.

importantly, the Counties' Flow Control laws, especially once fully implemented, if widely followed by other local governments, would severely restrict or eliminate interstate commerce.

V. The Purpose and Benefits of Flow Control

21. Flow control generally refers to legal restrictions imposed by local, regional or state governments on the transport and disposal of solid waste. Historically, these governments have found flow controls attractive to meet one or more of the following objectives: 1) protecting a public investment from competition; 2) subsidizing a public purpose; 3) avoiding the subsidization of external users; and 4) achieving self-sufficiency. Each of these objectives are protectionist in nature and restrict the interstate waste disposal market. At the same time, none of these objectives is consistent with the efficient allocation of resources.[10] The first three objectives are intended to thwart competitive pressures that would regularly result in an efficient distribution of waste disposal sites and serve essentially to further financial objectives; Waste disposal costs to those residing or working in regions governed by flow control actually increase as a result. The fourth objective rejects the benefits of the competitive market in favor of self-reliance without

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[10] Several academic studies have demonstrated the efficiency losses attributable to flow control. See, Eduardo Ley, Molly K. Macauley, Stephen W. Salant, "Spacially and Intertemporally Efficient Waste Management: The Costs of Flow Control," Resources for the Future, Working Paper 96-23, July 1996; Eduardo Ley, Molly Macauley, and Stephen Salant, "Restricting the Trash Trade," American Economic Review, Vol. 90, No. 2, May 2000; Richard C. Porter, *The Economics of Waste*, Resources for the Future, Washington, D.C., 2002.

considering the costs or burdens on interstate commerce.

22. The first objective generally addresses investments in incinerators or resource recovery plants (disposal facilities that burn trash and generate steam for electricity generation, heating, or industrial purposes). These plants are expensive to build and require substantial revenue streams to justify their construction and continued operation. Revenue streams from electricity and/or steam sales were expected to make it possible to charge disposal or tipping fees at levels consistent with landfills, the most common waste disposal alternative. Actual revenues, however, frequently fell short of achieving this objective, either because of plant performance problems, changes in air quality regulations, low energy content in the waste stream or changes in electricity markets.[11] As a result, plant operators were forced to raise tipping fees to meet debt obligations. Higher fees made alternative disposal sites more attractive, potentially drawing waste and revenues away. Flow control was imposed to prevent waste generators or transporters from moving to these

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[11] Changes in government regulations were largely responsible for three of these problems. More stringent state and federal air quality standards imposed new costs on incinerators. The energy content of waste streams began to fall as governments also began imposing recycling requirements that eliminated paper and plastics from wastes delivered to the plants for a time. Federal regulations under the Public Utility Regulatory Policies Act (PURPA) guaranteed high electricity rates for resource recovery plants by directing that utilities pay so-called avoided costs to independent power producers. While these payments were high initially, new power plant construction and slower demand growth quickly lowered them.

lower cost alternatives.[12] In response to this flight risk, flow control became a required element of resource recovery plant investments and the financing of such facilities became problematic without flow control in place.[13] Flow control has also been used to protect material recovery facilities, municipal landfills and, as in *Carbone*, transfer stations from market competition.[14]

23. There is no doubt that in the absence of flow control, most solid waste markets would be interstate, especially those in the northeast where land costs and population densities are high. Changes in regulatory and industry structure have led to expansive geographic markets served by regional landfills. Stringent federal environmental regulations have increased the start up and construction costs for new landfills. As these costs do not vary substantially with landfill size, there is an incentive to construct larger facilities in order to spread fixed costs over greater volumes of disposed waste. These larger facilities can charge lower rates than similarly designed smaller sites, thereby drawing waste from more distant origins. Consequently, efficient markets will rarely if ever conform to local political

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12 As of 1998, almost half of all resource recovery plants constructed since 1965 benefited from flow control. Most of the other half relied on long term contracts to avoid market pressure.

13 See for example, John Carlin, "The Impact of Flow Control and Tax Reform on Ownership and Growth in the U.S. Waste-to-Energy Industry," Energy Information Administration, *Monthly Energy Review*, September 1994 and Martha M. Canan, "Moody's to Drop More Ratings Unless Flow Control Laws Protected," *The Bond Buyer*, June, 2, 1995. Note that immediately following the *Carbone* decision Moody's lowered its ratings on bonds associated with 14 facilities and gave 33 others unfavorable rating outlooks.

14 *C & A Carbone, Inc. v. Town of Clarkstown*, N.Y. 511 U.S. 383 (1984)

boundaries. As the number of landfills has fallen nationwide over the past two decades, the average size of these facilities has increased substantially, and the amount of waste shipped across state borders has more than doubled.

24. The solid waste industry as a whole, including collection, transportation and disposal services, began to undergo a period of consolidation following these regulatory changes leading to larger more vertically integrated waste management companies.[15] As waste collectors, vertically integrated companies are more likely to be willing to transport garbage to their own disposal sites, even if those sites are somewhat more distant than the closest local landfill. In fact, when locating and constructing new landfills, large integrated firms will search for sites that can serve as many sources of waste as economically as possible, often across state borders. Such facilities require a larger investment of capital and the acquisition of specialized trucks, rail cars and transfer stations to make longer hauls cost efficient.

25. In the face of these trends, flow controls result in the destruction of commerce among the states and seriously constrain markets at great costs to waste generators and private waste firms. Disposal rates have generally fallen notably where flow controls have been eliminated. In Hennipen County Minnesota, for example, tipping fees fell from $95 per ton to only $45 per ton when flow control was lifted. Similarly, in Nassau County, New York, tipping fees fell from $108 per ton to $76 per ton when flow control ended following the *Carbone* decision. A study conducted for Browning Ferris

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[15] Office of Technology Assessment, Facing America's Trash: What Next For Municipal Solid Waste, October 1989, pp. 53-54.

Industries found that flow control increased tipping fees by almost 40 percent.[16] A study by the National Solid Waste Management Association found similar differences.[17]

26. The second objective – subsidizing a public purpose – refers to investments in recycling and materials recovery programs and facilities. Flow control has proved an attractive means to finance such programs and facilities. Excluding private sector scrap metal and most paper recycling operations, few, if any, recycling programs succeed at covering their own costs through sales. By directing the flow of waste to recycling and/or materials recovery facilities (MRFs), local governments can impose fees on all waste generators or transporters to cover unmet recycling facility capital and operating costs. In the absence of this flow control revenue, governments would be forced to finance recycling through direct charges on the disposal of recyclable materials and/or through taxation. Governments dislike the first alternative because it is likely to discourage rather than promote recycling. Governments dislike the second alternative because raising taxes is rarely popular. In addition, it is sometimes argued that taxes fail to distribute costs primarily to the waste generators. While these may seem to be reasoned objections, they misconstrue the use of fees and taxes. Undifferentiated tipping fees often associated with flow control lead to inefficient levels of recycling and hide the true cost of recycling from local residents. Having to directly respond to taxpayers through taxes

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[16] National Economic Research Associates, "The Cost of Flow Control," prepared for BFI, May 3, 1995.

[17] As reported in Michelle Roberts, "Sink or Swim: Local Governments Go With the Flow, *World Wastes*, December, 1994, p. 48.

and fees directly related to the services provided can serve as an incentive, not present in Oneida and Herkimer Counties, to be both innovative and cost conscious.

27. Based on an extensive study, the U.S. Environmental Protection Agency determined that flow control is not essential for the long-term achievement of source reduction and recycling goals.[18] Following an exhaustive nationwide review, the EPA found no data to support the need for flow control. Specifically, the EPA stated:

> there are no data showing that flow controls are essential either for the development of new solid waste capacity or for the long term achievement of State and local goals for source reduction, reuse and recycling.

The EPA also found that, while flow control was employed to benefit a substantial share of capital intensive MRFs, only 2.7 percent of recycled materials were subject to flow control.[19]

28. Flow control also is imposed to capture greater volumes of recyclables in order to lower unit recycling costs. Arguably, with greater volume, a recycling facility's capital costs are spread over more tons, thereby lowering unit costs. While this may improve the financial performance of the facilities and reduce the market prices necessary to break even, it does not in the end promote greater recycling. Lower unit costs alone will not increase the demand

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[18] U.S. Environmental Protection Agency, Office of Solid Waste, Municipal and Industrial Solid Waste Division, Report To Congress, Flow Controls and Municipal Solid Waste, March 1995.

[19] U.S. Environmental Protection Agency, Report to Congress, Flow Controls and Municipal Solid Waste, March 1995.

for recycled materials. Market prices for many recycled materials remain low, but absent demand they often end up in landfills.[20] In addition, if funds are used to expand the number of recycled materials handled, unit costs per recycled ton may not fall at all.

29. The third objective – avoiding the subsidization of external users – refers to preventing non-taxpayers from benefiting from tax supported or subsidized public projects. In this circumstance, flow control works to keep waste out rather than in. Government run facilities are constructed for the benefit of local residents and businesses. If they would otherwise offer lower cost (because of tax support) or more convenient disposal services to non-residents, then some barrier must be erected to keep non-residents out. Moreover, in the case of a landfill with a finite life, the local government may want to save capacity for its residents. For the reasons noted above, however, waste for burning or recycling is often exempt from this restriction because more waste is better. Restricting out of county waste also protects the public facility from competition. A private company will rarely locate a waste management facility (i.e., a landfill, transfer station, waste-to-energy or recycling facility) within a jurisdiction if it does not have access to local waste. The result is often above-market waste disposal costs.

30. The fourth objective – self-sufficiency – refers to the objective that each government should be responsible for its own waste. Meeting this objective means restricting waste flow in both directions. There should be no imports or exports. Although self-sufficiency is a laudable objective in many cases, it is

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[20] See R. Porter, *The Economics of Waste*, Resources for the Future, 2002.

not an efficient objective when it comes to solid waste. Cities, counties, and states all possess certain comparative advantages that go unrecognized when the objective of self-sufficiency is imposed. Indeed, the Commerce Clause was intended to promote the recognition of comparative advantages. The clause was intended to prevent the states from erecting trade barriers that would protect high cost local industries from low cost competitors in other states – at a cost to both consumers and the more efficient industries. As stated by Justice O'Connor, in her concurring opinion in *Carbone*, "pervasive flow control would result in the type of balkanization the Commerce Clause is primarily intended to prevent."

31. As discussed above, the trend toward large, cost-effective and environmentally protective geographic markets in solid waste argues against local self-sufficiency.

32. In addition, self-sufficiency also generally refers to reliance on the public sector to provide waste management services. There is no reason that this should be the case. Solid waste management does not meet the criteria for a natural monopoly where a single operator run by or regulated by a local or regional government is the most efficient solution. Although there are economies of scale in disposal, virtually all markets can or do support several competitors. Entry barriers, especially for hauling, are extremely low and, as a consequence, most markets include numerous hauling companies.

33. It is also important to recognize that solid waste management is not solely a traditional public sector

enterprise.[21] Many markets historically have been served by the private sector. A survey of cities in New York State in 1984, for example, found that 42 percent of these cities relied on the private sector for residential waste collection and another 4 percent contract out these services to private firms. Over 70 percent of the cities relied on the private sector for commercial waste collection and another 4 percent contract out these services to private firms.[22] (See Exhibit 3.) Over the period 1991 through 2001, privately owned landfills have increased from 46 percent to 60 percent.[23] Private firms are even more dominant in waste hauling. A 1970 survey identified over 10,000 waste disposal firms, mostly family run.[24] A more recent study indicates that 82 percent of the garbage sector trucks in the United States are owned and operated by private companies.[25]

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21 A study of solid waste practices from 1880 to 1980 shows that the private sector has continually had an important role in waste collection and disposal. In 1880, only 24 percent of 149 cities with populations exceeding 247,000 relied on public provision of these services. Between 1880 and 1924 this percentage varied considerably, but never exceeded 63 percent. Martin V. Melosi, Garbage in the Cities, Refuse, Reform, and the Environment, 1880-1980, Texas A&M Press: College Station, 1981.

22 Survey by Ecodata Inc., reproduced in Privatization for New York: Competing for a Better Future, A Report of the New York State Senate Advisory Commission on Privatization, January, 1992, p. 220.

23 Solid Waste Digest, Vol 12, No.15, May, 2002, p. 1.

24 Jose A. Gomez-Ibanez, John R. Meyer and David E. Luberoff, "What are the Prospects for Privatizing Infrastructure? Lessons from U.S. Roads and Solid Waste," in Is There a Shortfall in Public Capital Investment?, Federal Reserve Bank of Boston, June 1990, pp. 143-174.

25 Gordon, Burdelski, and Cannon, "Greening Garbage Trucks: New Technologies for Cleaner Air", INFORM, Inc. (New York, NY).

34. This is also the case in Oneida and Herkimer Counties. A Malcolm Pirnie Engineers study, performed for the Herkimer-Oneida Counties Planning Program, reported that as of 1969 "many of the towns [in the Study Area] have no provision for waste disposal" (p. 101) and that the Counties played no role in waste management. In fact, 40 percent of the Study Area had no organized waste collection (p. 1) and "arrangements with private contractors constitute[d] a major portion of the collection effort." (p 1).

35. That pattern continues today. Of the 79 cities, towns and villages in the two Counties only nine provide direct municipal collection services, while 16 provide for collection through contracts with private haulers. The remaining 54 provide no service.[26]

36. Thus, the evidence demonstrates that the notion that waste collection and disposal both typically and traditionally are local government functions is simply not accurate — nationally or in these Counties. Accordingly, to the extent that self-sufficiency is offered as an objective intended to meet a traditional government function, it cannot be sustained.

VI. The Purposes and Benefits of Oneida and Herkimer Counties' Local Laws

37. The Counties' Flow Control Laws objectives are consistent with those discussed above. They are intended to protect local investments and subsidize environmental and social objectives. As noted above, flow control is a poor tool to reach these objectives as it results in an inefficient allocation of resources. This is evidenced by tipping fees well in excess of

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[26] This excludes road cleanup, brush removal or hauling of municipality-generated wastes or recyclables.

those found elsewhere in New York State in jurisdictions without flow control. Fees charged by the Oneida-Herkimer transfer stations are 68 percent higher than the New York State average. At the same time, the counties here achieved no substantial improvements regarding recycling, waste reduction and public health and safety when compared to jurisdictions without flow control. Below, I review the objectives of the Flow Control Laws and their consequences.

38. Oneida County Local Law No. 1 of 1990 and Herkimer County Local Law No. 1 of 1990 both require all waste generated in each County (excluding certain categories of recyclables) to be collected by government entities or licensed haulers and delivered only to facilities designated by the Oneida-Herkimer Solid Waste Management Authority. The stated purpose of the Flow Control Laws is "to provide for public health and safety and to facilitate the conservation of vital natural resources" and to "facilitate the sale of recyclable materials."

39. Robert F. Julian, the original drafter of Oneida County Local Law No. 1 of 1988, the precursor to Oneida County Local Law No. 1 of 1990 (see Section III above), has explained in his July 5, 1995 affidavit that the Local Law was enacted in response to the public's desire for "a new recycling based approach" (¶ 45). He offers a more detailed list in paragraph 46 of his affidavit of the objectives that the local law was intended to meet, namely:

    - To replace high volume undifferentiated waste and disposal with a system that would match the best management method to each component of solid waste;

- To make waste reduction and recycling the legally mandated top priorities for solid waste in the County;
- To establish and expand markets for recyclables;
- To protect public health, safety and welfare by requiring regular collection and environmentally sound waste processing and disposal through the Counties;
- To stop backyard burning and roadside dumping of waste;
- To make sure that both recyclables and waste would be set out at the road by waste generators in a form and manner to insure its proper delivery to the recycling and disposal facilities;
- To establish a basic framework of responsibility, consistent with state and federal laws for waste generators, haulers towns villages, cities and the county or its agents; and
- To conserve vital natural resources.

40. In reviewing these objectives it is critical to distinguish between the objectives of the recycling/waste management provisions of the law and the financing provisions of the law. This is consistent with the Second Circuit's admonishment in its *United Haulers* decision that the analysis of flow control ordinances should be severed from other aspects of a waste management plan. *United Haulers*, 261 F.3d 245, 267 (2001).

41. In reality, the Local Laws, as implemented through the Oneida-Herkimer Solid Waste Authority, serve a dual purpose – first, the prioritization of recycling as a key component of what is identified as integrated waste management; and second, flow control. As

explained in Section III, the available history establishes that the flow control objectives of Oneida County are consistent with the general flow control objectives reviewed in the previous section of this report. Thus, the unstated objectives of the Flow Control Law in both Counties was 1) to protect Oneida County's existing and proposed future investments; 2) to finance recycling facilities (principally the MRF) and other non-self-sufficient services without additional taxation; and 3) to protect a government-run landfill from open market competition. As simply stated by the Executive Director of the Authority, "when waste is taken out of the Authority system, it also diverts the revenue needed to operate Authority facilities and services."[27]

42. The Oneida-Herkimer Solid Waste Management Authority was created in 1988 to establish an "integrated system of solid waste disposal" and to alleviate "important public health and environmental concerns." Its stated objectives are consistent with those associated with the local recycling laws. The major step toward integration took place in 1989, when the Authority executed two Agreements with the Counties, and in 1990 when, pursuant to the Agreements, the Authority took control of the Oneida Energy Recovery Facility (ERF) waste-to-energy plant, including its long-term financial obligations, and purchased the Materials Recycling Facility (MRF). The goal of the Authority is clearly to make the counties self-sufficient in the collection and disposal of solid waste. The Authority's plans call for the operation of eight facilities: a landfill, a recycling center; a combined household and small quantity generator hazardous waste facility, a green

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[27] H. Arnold Ltr. to Richard Lynch, February 1, 2001.

waste and a hard waste facility (e.g., tree stumps) and three transfer stations. The system, as designed, would manage all residential and commercial waste generated in the Counties. The transfer stations serve as central collection points where waste is collected and transhipped for disposal in a landfill.

43. In 1990 and 1991, bonds totaling $50.9 million were issued by the Authority to finance several years of operations, the purchase of the existing facilities, the financial obligations the Authority assumed from the Counties and to build a new transfer station and the planned landfill. Exhibit 4 breaks down the bond issues by facility. The MRF accounted for over 45 percent of the total bond obligations. The acquisition of the ERF accounted for another 11.4 percent. In 1995, the Oneida ERF was closed leaving the Authority with revenue bond liabilities that represented a large fraction of its $5.-80 million acquisition cost. Consequently, the Authority collects revenues principally through tipping fees to cover not only operating costs at its active facilities, but also to cover these financial obligations as well. As indicated in the Authority's 2001 budget proposal, almost one-third of the tipping fees it collects go to debt service As shown in Exhibit 5, about 6 percent are allocated to recycling, green waste and household hazardous waste. These figures, however, understate the revenue shares allocated to these facilities and programs because they exclude debt service on related capital investment, such as the MRF facility.

44. Flow control has not only enabled the Counties to cover the cost of the failed resource recovery plant, it also has enabled the Authority to heavily subsidize its recycling efforts, while at the same time removing solid waste management expenditures as a line item

in the Counties' tax-funded budget. Exhibit 6 shows that without tip fee revenues, all of the Authorities other programs have operated at a loss in most years.

45. As a result of these subsidies, total tipping fees charged by the Authority are well above the average in New York State. The Oneida Herkimer transfer stations charge $86 per ton ($79 under contract), which compares to an average of only $51.18 per ton for transfer stations in the state.[28]

46. Flow control will also protect the Counties' planned landfill from competition. The landfill will have a guaranteed demand and not be subject to competitive pressure from landfills outside the counties or the threat of entry into the market by a private landfill or transfer stations. No private investor will choose to locate within the counties if local waste is inaccessible.

47. In addition, the premise behind the Authority is of questionable economic validity. The benefits of a centrally planned integrated waste management system are not obvious. As noted above, many local governments, including those in Oneida and Herkimer Counties, continue to rely on the private sector to adequately meet solid waste disposal needs.

48. The benefit of a government run system with respect to environmental liability is also questionable. Historically, government run facilities were often the least environmentally responsible. For example, as shown in Exhibit 7, a large percentage of municipal landfills that have become Superfund sites were publicly run. Almost a third of the landfills designated as Superfund sites in New York State were owned by municipal or county governments.

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[28] Solid Waste Price Index, August 2002.

Unsupervised city or county dumps, frequently with free access, often became serious environmental problems. In contrast, many private facilities were closely supervised and charged fees sufficient to monitor disposal and provide some insurance protection against environmental damage.

49. It is also not clear that vital natural resources are being protected by the Flow Control or the recycling provisions in the local laws. The planned Authority landfill is proposed to be placed in a wetland area and will require exemptions from some environmental controls in order to be completed. Absent the flow control laws, waste generated in the Counties could continue to be shipped to approved landfill sites that do not compromise wetlands. In addition, no evidence has been offered to demonstrate that all (or any) of the materials accepted for recycling actually save natural resources.

VII. The Authority's Financial Purposes Could be Met By Other Means and the Intended Benefits of Recycling and Waste Reduction do not Result from Flow Control

50. Taxes, fees, regulations, and contracts are effective means to meet the objectives of the Authority and the purpose behind flow control (i.e., finance the integrated waste management system). These means have much less impact on interstate commerce. Moreover, controls at the state or federal level may be more appropriate and have even less impact on commerce. The list of non-financial objectives to be met by the Local Laws presented above (paragraph 39) could be met by means other than flow control. A brief review of the Counties' objectives follows and their alternatives follow.

51. Waste reduction and recycling were the top mandated priorities according to the legislative history. The EPA, however, found that flow control was not necessary to meet these priorities and that other methods were available to local governments. The experience elsewhere in New York State bears this out. Numerous counties in New York State have achieved recycling and waste reduction levels equal to or better than Oneida and Herkimer Counties without flow control. As shown in Exhibit 8, 12 counties without flow control equal or exceed the Counties recycling levels. Eleven of these have never implemented flow control. These counties rely on a number of mechanisms to achieve these levels, including special taxes and fees[29]. Exhibit 9 shows that 33 counties have achieved lower waste generation per capita levels than Oneida and Herkimer Counties without flow control. At least twenty-six of them have never relied on flow control.

52. The EPA, as referenced earlier also found that flow control was unnecessary to protect the public health and safety. The EPA stated, "protection of human health and the environment is directly related to the implementation and enforcement of federal, State, and local government regulation. Regardless of whether State or local governments administer flow control programs, States are required to implement and enforce federally approved regulations that fully protect human health and the environment. Accordingly, there are no empirical data showing that flow control provides more or less protection."

53. The source separation objective can be met through regulation.

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[29] Lisa M. Porter, "OCRRA NY State Waste Survey, June 2000 (http://www.ocrra.org/Survey Results-Table of Contents.htm).

54. Consistent with the EPA finding, the prevention of illegal dumping can be met through regulation. Indeed, because flow control artificially increases the cost of waste disposal, it potentially encourages illegal dumping.

55. The prevention of illegal burning can be met through regulation as well. Again, because flow control artificially increases the cost of waste disposal, it potentially encourages illegal burning.

VI. Conclusion

56. Based on my review, I have concluded that the flow control imposed by these laws, whether it instituted to provide a financial mechanism for protecting public investment or for sponsoring environmental or other social objectives, clearly interferes with interstate commerce. This interference is not outweighed by any local benefits that could not be achieved by other less intrusive means. Moreover, protecting a public investment is not a public benefit if it costs taxpayers more than relying on private enterprise. As documented here, the citizens and businesses of Oneida and Herkimer Counties are paying a substantial premium to support public investments. At the same time, other counties are achieving objectives similar to those outlined by County officials without flow control.

VII. Documents Considered

57. I considered the following documents in developing my opinions expressed above:

1. Affidavit of Robert F. Julian, Ex. J-11. July 5, 1995.

2. Office of Technology Assessment. "Facing America's Trash: What Next for Municipal Solid Waste?" October 1989.

3. National Economic Research Associates. "The Cost of Flow Control." Prepared for BFI, May 3, 1995.

4. Roberts, Michelle. "Sink or Swim: Local Governments Go with the Flow". World Wastes. December, 1994.

5. U.S. Environmental Protection Agency. Office of Solid Waste. Municipal and Industrial Solid Waste Division. Report to Congress. Flow Controls and Municipal Solid Waste. March 1995.

6. Porter, R. The Economics of Waste, Resources for the Future. 2002

7. Melosi, Martin V. Garbage in the Cities, Refuse, Reform and the Environment, *1880-1980*. Texas A&M Press; College Station, 1981.

8. New York State Senate Advisory Commission on Privatization. Privatization for New York: Competing for a Better Future. January 1990.

9. Solid Waste Digest. Volume 12, Number 15. May 2002.

10. Jose A. Gomez-Ibanez, John R. Meyer and David E. Luberoff, "What are the Prospects for Privatizing Infrastructure? Lessons from U.S. Roads and Solid Waste," in Is There a Shortfall in Public Capital Investment? Federal Reserve Bank of Boston, June 1990.

11. Gordon, Burdelski, and Cannon, "Greening Garbage Trucks: New Technologies for Cleaner Air", INFORM, Inc. (New York, NY).

12. Solid Waste Price Index, August 2002.

13. Porter, Lisa M. "OCRRA NY State Waste Survey, June 2000 (http://www.ocrra.org/Survey).

A list of additional documents that I considered is presented in Exhibit 10.

I declare under penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct.

Executed this 15th of November, 2002, at Oakland, California.

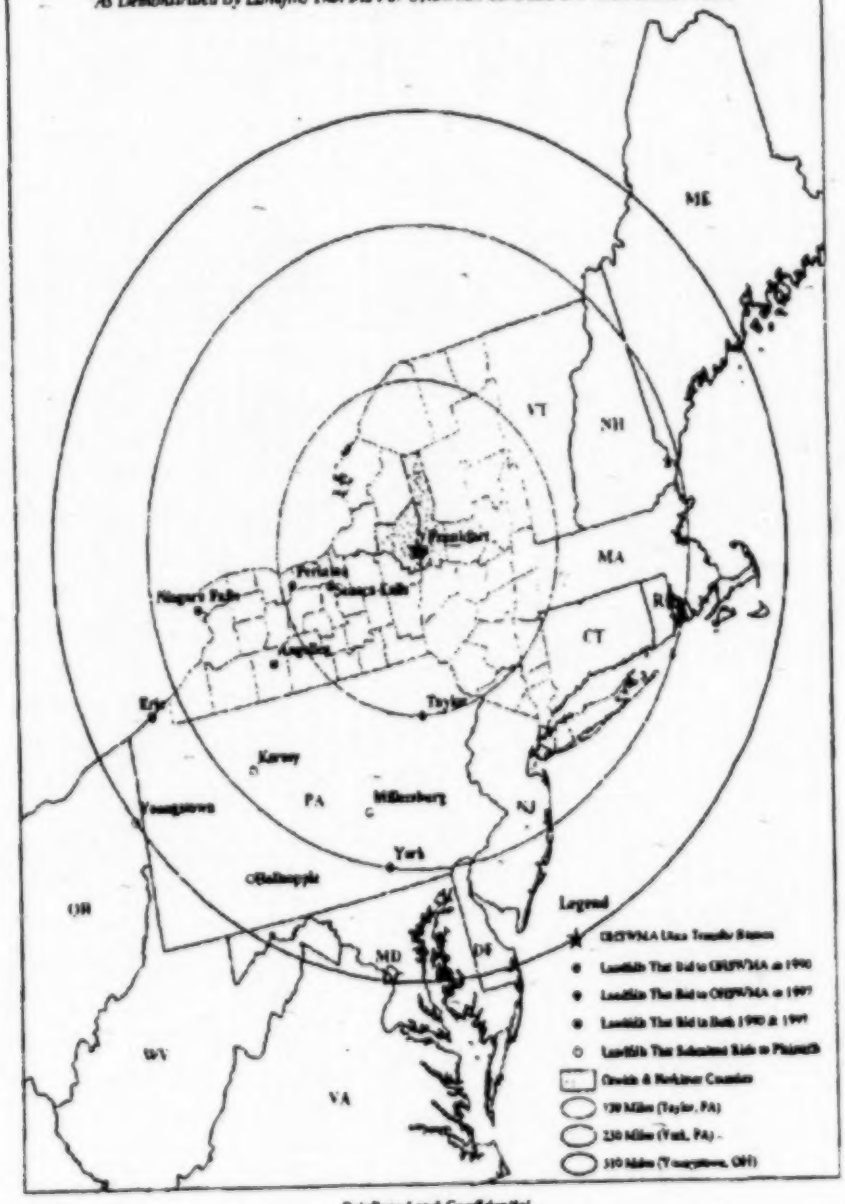
/S/Mark P. Berkman
Mark P. Berkman

[EXH. 1 – BERKMAN CV OMITTED IN PRINTING]

Exhibit 2

Geographic Market For Oneida & Herkimer County Waste Is Multi-State

As Demonstrated By Landfills That Bid For OHSWMA Contracts or Private Hauler Waste



Privileged and Confidential
Prepared at the Request of Counsel

Exhibit 3

Cities in New York State Have Historically Relied Heavily on the Private Sector for Waste Collection

Percent of Cities Relying on Different Collection Arrangements in 1984

Collection Arrangement	Residential Service	Commercial Service
Municipal	54%	25%
Private	42%	71%
Contract	4%	4%
Total	100%	100%

Source: Survey performed by Ecodata, Inc. Westport, CT, presented in Stevens, Barbara. "Solid Waste Management." Privatization for New York: Competing for a Better Future – A Report of the New York State Senate Advisory Commission on Privatization. Ed. E.

Exhibit 4

Allocation of OHSWMA Series 1990A and 1991 Bond Issues

	($)	%
Eastern Transfer Station		
Acquisition and Construction of TFS (1991 Bonds)	1,386,440	2.7%
Energy Recovery Facility		
Acquisition of the ERF (1991 Bonds)	5,801,127	11.4%
Materials Recovery Facility		
Deposit to Construction Fund (1990 Bonds)	19,509,421	38.3%
Materials Recovery Account (1990 Bonds)	3,635,619	7.1%
Total MRF	23,145,040	45.5%
Other		
Deposit to Debt Service Reserve Fund (1990 Bonds)	4,280,000	8.4%
The General Administrative Account (1990 Bonds)[1]	2,383,992	4.7%
The Project Studies Account (1990 Bonds)[2]	3,731,722	7.3%
The Capitalized Interest Account (1990 Bonds)[3]	7,930,716	15.6%
Costs of Issuance (1990 Bonds)	1,328,530	2.6%
Deposit to Debt Service Reserve Fund (1991 Bonds)	685,064	1.3%
Costs of Issuance (1991 Bonds)	227,369	0.4%
Total Other	20,567,393	40.4%
Total	**$50,900,000**	

Notes

(1) Administrative and operating costs of the Authority are expected to be paid from the proceeds of the Series 1990A Bonds and other funds expected to be received upon acquisition by the Authority of the MRF through January 1, 1994.

(2) Engineering and legal fees of the Authority are expected to be paid from the proceeds of the Series 1990A Bonds.

(3) Interest (including annual fees to be paid to the Bank and the Remarketing Agent) is capitalized from the date of delivery of the Series 1990A Bonds through April 1, 1993 at an assumed interest rate of 8.075 percent.

Sources

(1) OHSWMA Series 1990A Bond Issue (A 000012)

(2) OHSWMA Series 1991 Bond Issue (A 000236)

Exhibit 5
Budgeted Allocation of OHSWMA Tip Fee in 200

Function	($) Per Ton	%
Central Support	2.78	3.5%
Recycling Center	4.28	5.4%
Disposal	46.87	59.3%
Administration	0.85	1.1%
Green Waste Compost	0.05	0.1%
Household Hazardous Waste	0.38	0.5%
System Debt Service	23.79	30.1%
Total	79.00	

Source: Memorandum from Hans G. Arnold re: Proposed 2001 Budget, 10/30/00 (A 002723 - 002725)

Exhibit 6
In the Absense of Disposal Tip Fees, The Authority's Other Facilities Would Operate At a Loss

Net Balance of Facilities (Revenue - Appropriations), Excluding Tip Fees

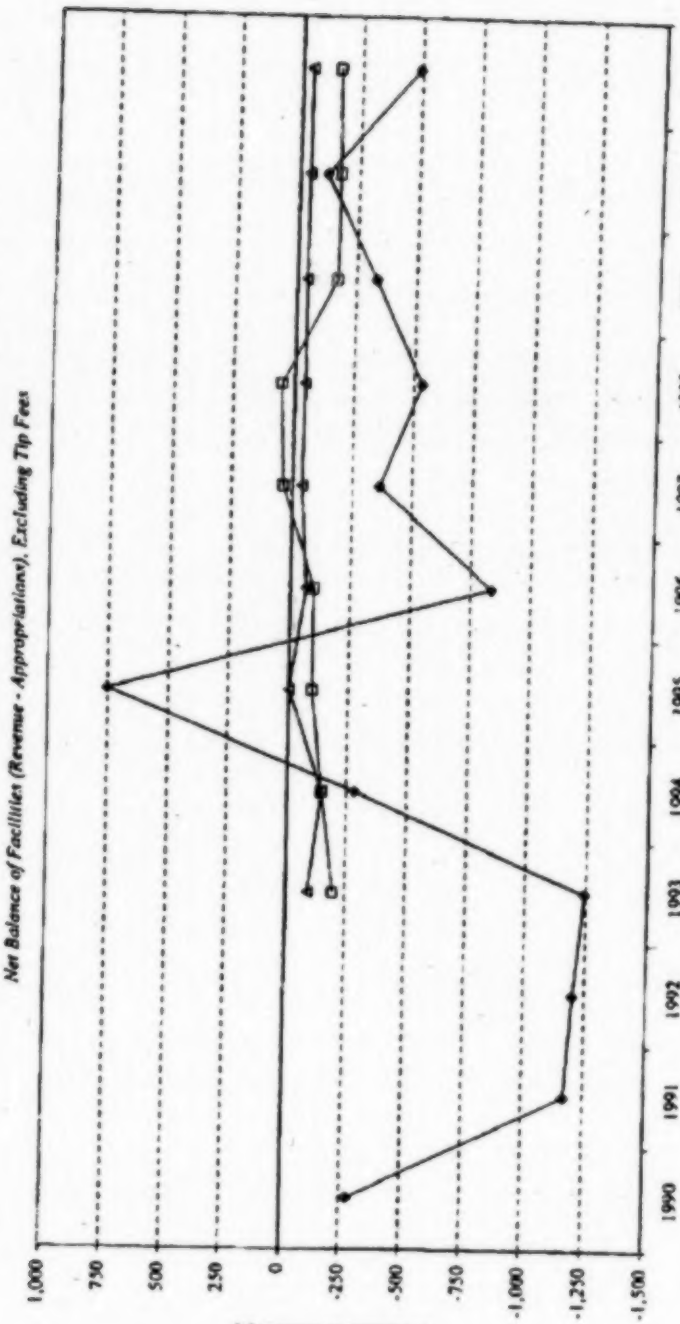


Exhibit 7
A Substantial Share of Landfill Superfund Sites are Owned by Local Governments

Landfill National Priority List Superfund Sites in 1990

US Total

	N	%
Landfill Sites Owned by Local Government[1]	31	15.58%
Landfill Sites that are Privately Owned	61	30.65%
Other[2]	107	53.77%
Total	199	

New York State

	N	%
Landfill Sites Owned by Local Government[1]	6	31.58%
Landfill Sites that are Privately Owned	5	26.32%
Other[2]	8	42.11%
Total	19	

Notes

(1) Local ownership is identified as "Municipality"or "County Owned."

(2) 'Other' category includes: (i) Federally Owned, (ii) State Owned, (iii) Indian Lands, (iv) Mixed Ownership, & (v) Other.

(3) US and NY NPL totals calculated from EPA's CERCLIS database. Totals only include NPL sites where the site category was identified as "Landfill." In NY, there were 10 sites where the category was not identified. In the US, there were 234 sites where the category was not identified.

(4) Note: Data reflect Superfund sites that had an NPL status of "Final" or "Proposed" in August, 1990.

Source: EPA's CERCLIS database.

Exhibit I

Many New York Counties Have Achieved Equal or Better Recycling Rates Than Oneida-Herkimer Without Imposing Flow Control

Percent of Waste Stream Recycled in New York State Counties or Solid Waste Management Units in 1995, Units in Tons

Rank	Waste Management Unit	Total	Disposed	Recycled	% Recycled	Flow Control in 1995	Flow Control Prior to Carbone Decision[2]
1	SCHUYLER COUNTY	41,709	13,269	28,440	68.18%	NO	NO
2	ONONDAGA COUNTY RRA	995,482	368,066	627,533	63.03%	NO	NO
3	WARREN/WASHINGTON COUNTIES	28,686	10,633	17,953	62.73%	NO	NO
4	BROOME COUNTY	299,875	115,783	184,372	61.48%	NO	NO
5	JEFFERSON COUNTY	178,068	70,687	107,379	60.29%	NO	YES
6	CATTARAUGUS COUNTY	130,238	62,133	71,325	53.76%	NO	NO
7	ORANGE COUNTY	12,281	5,789	6,491	52.88%	NO	NO
8	SHELTER ISLAND	4,898	2,259	2,639	51.04%	NO	NO
9	CAYUGA COUNTY	134,795	59,631	75,163	55.76%	NO	NO
10	SOUTHAMPTON	14,688	9,139	5,549	36.55%	NO	NO
11	ALLEGANY COUNTY	33,439	27,442	17,997	36.58%	NO	NO
12	EAST HAMPTON	32,444	19,288	13,156	40.54%	NO	NO
13	ONEIDA-HERKIMER Fm AUTHORITY	930,360	536,148	393,363	42.28%	YES	YES
14	LEWIS COUNTY	42,286	23,827	18,366	43.42%	NO	NO
15	MONROE COUNTY	1,679,826	777,409	902,411	53.73%	NO	YES
16	ORANGE COUNTY	361,253	184,638	176,871	48.93%	NO	NO
17	TOMPKINS COUNTY	106,551	61,344	45,207	42.36%	-	-
18	WESTCHESTER COUNTY	1,317,833	894,403	423,378	32.13%	-	-
19	STEUBEN COUNTY	317,399	138,964	84,433	42.68%	NO	NO
20	DELAWARE COUNTY	30,203	43,253	28,527	48.13%	NO	NO
21	NORTHWEST COMMUNITIES OF ERIE CO.	254,668	154,267	95,959	39.21%	NO	NO
22	COLUMBIA COUNTY	63,264	34,859	28,660	34.41%	NO	NO
23	ERIE	378,599	256,643	126,726	28.23%	NO	NO
24	ALBANY COUNTY/ANSWERS	225,455	97,287	64,668	36.50%	NO	NO
25	NEW YORK CITY	9,219,888	5,871,858	3,365,833	36.86%	NO	NO
26	TIOGA COUNTY	30,983	20,681	11,292	35.13%	NO	NO
27	CORTLAND COUNTY	42,760	27,371	14,747	34.58%	-	-
28	HUNTINGTON	173,859	113,686	57,831	36.46%	NO	NO
29	BROOKHAVEN	389,463	191,917	97,546	43.68%	NO	NO
30	CHEMUNG COUNTY[3]	29,286	19,136	9,678	32.45%	YES	YES
31	ST. LAWRENCE COUNTY RRDA	51,493	34,398	16,772	31.27%	NO	YES
32	OYSTER BAY	244,823	169,871	73,752	30.54%	NO	NO
33	CHAUTAUQUA COUNTY	335,727	170,348	164,979	30.82%	-	-
34	ERIE COUNTY	14,753	10,383	4,330	45.47%	NO	YES
35	SMITHTOWN	144,333	103,572	42,599	29.15%	NO	NO
36	BABYLON	247,259	179,648	68,021	27.97%	NO	NO
37	HEMPSTEAD	863,484	634,638	243,854	27.81%	NO	NO
38	NORTH HEMPSTEAD	348,287	188,316	62,991	36.49%	NO	NO
39	DUTCHESS CO. SOL. RECOV. AGENCY	348,774	229,138	51,636	26.27%	NO	YES
40	LEWIS CO.	225,741	166,127	37,619	22.75%	NO	NO
41	OLEY COVE	25,844	17,479	3,513	36.19%	NO	NO
42	GLOW REGION SWM COMMITTEE	126,132	93,649	38,283	22.78%	NO	NO
43	LONG BEACH (CITY)	35,752	23,209	6,643	22.41%	NO	NO
44	WESTERN FINGER LAKES SWMA	21,201	161,256	43,847	21.69%	-	-
45	SCHENECTADY COUNTY	134,456	106,241	28,233	21.01%	NO	NO
46	MADISON COUNTY[4]	43,241	34,250	8,991	20.75%	NO	NO
47	CESCOMM	73,858	60,061	13,881	19.03%	-	-
48	ROCKLAND COUNTY SWM AUTHORITY	322,709	268,507	60,802	19.52%	-	-
49	HAMILTON COUNTY	8,687	6,890	1,377	16.99%	NO	NO
50	ERIE SWMA	9,591	8,199	1,396	14.33%	NO	NO
51	FULTON COUNTY	72,083	56,146	8,937	11.80%	NO	YES
52	CHEMUNG COUNTY[5]	99,744	90,221	9,423	9.45%	YES	YES
53	NIAGARA COUNTY	218,442	192,859	19,883	9.35%	-	-
54	CLINTON COUNTY	54,503	51,336	3,167	5.14%	NO	NO
55	CITY OF BUFFALO	167,719	153,002	14,586	8.70%	NO	NO
56	SULLIVAN COUNTY	71,678	66,901	4,777	6.64%	NO	NO
57	SARATOGA COUNTY	121,764	114,254	3,510	6.17%	NO	NO
58	NIOSA SWM AUTHORITY	136,138	123,677	5,031	4.91%	NO	YES
59	FRANKLIN COUNTY SWM AUTHORITY	31,676	28,984	692	2.36%	NO	YES

Notes

(1) "-" identifies waste management units that have been considered, but have not responded.

(2) C & A Carbone, Inc. v. Town of Clarkstown, New York, 114 S.Ct. 1677, Decided June 11, 1994.

(3) Chemung and Chemung Counties prohibit the dumping of non-chemung waste at public facilities. They do not prohibit waste generated within the counties from leaving.

(4) Madison County implemented waste flow on its February 2002. The law requires flow control to continue similar to those implemented in Oneida and Herkimer Counties.

Sources

(1) Waste and recycling amounts reported to the New York State Department of Environmental Conservation (NYSDEC) Solid Waste Bulletin, 1995. Figures from 1994 are the most recent published data from the NYSDEC.

(2) Flow control requirements obtained through personal contact with regional administrators.

Exhibit 9

Many New York Counties Have Achieved Lower Per-Capita Waste Than Oneida-Herkimer Without Imposing Flow Control

Per-Capita Waste Generated in New York State Counties or Solid Waste Management Units in 1995, Ranked by Tons

Rank	Waste Management Unit	Population in 1995	Waste Disposed	Per-Capita Waste	Flow Control in 1995	Flow Control After In Carbone Decision[3]
1	FRANKLIN COUNTY SWM AUTHORITY	51[illegible]	[illegible]	[illegible]	NO	YES
2	GREENE COUNTY	48,739	3,789	0.93	NO	NO
3	SOUTHAMPTON	66,906	7,159	0.86	NO	NO
4	WARREN/WASHINGTON COUNTIES	98,851	10,835	0.28	NO	NO
5	COLUMBIA COUNTY	63,309	11,727	0.95	NO	NO
6	BROOME	37,933	8,199	0.33	NO	NO
7	ESSEX COUNTY	39,253	10,781	0.29	NO	YES
8	ST. LAWRENCE COUNTY SWDA	111,800	36,760	0.33	NO	YES
9	ALBANY COUNTY/ANDREWS	219,423	72,807	0.31	NO	NO
10	CHENANGO COUNTY[4]	51,290	19,174	0.28	YES	YES
11	TIOGA COUNTY	35,317	28,941	0.90	NO	NO
12	GLOW REGION SWM COMMITTEE	219,523	95,946	0.60	NO	NO
13	BROOKHAVEN	415,000	181,937	0.90	NO	NO
14	MADISON COUNTY[4]	71,709	34,330	0.48	NO	NO
15	CITY OF BUFFALO	300,000	135,000	0.91	NO	NO
16	ALLEGANY COUNTY	50,476	27,945	0.54	NO	NO
17	BROOME COUNTY	211,327	153,387	0.55	NO	NO
18	NORTH HEMPSTEAD	213,000	130,710	0.63	NO	NO
19	CORTLAND COUNTY	49,000	27,973	0.57	-	-
20	ORANGE COUNTY	331,000	184,618	0.59	NO	NO
21	HUNTINGTON	195,000	113,894	0.68	NO	NO
22	SARATOGA COUNTY	199,000	114,134	0.80	NO	NO
23	CLINTON COUNTY	83,139	51,336	0.60	NO	NO
24	OYSTER BAY	285,013	169,871	0.66	NO	NO
25	LONG BEACH (CITY)	34,334	23,789	0.63	NO	NO
26	TOMPKINS COUNTY	94,097	61,346	0.65	-	-
27	ISLIP	338,549	206,643	0.66	NO	NO
28	WESTCHESTER/PUTNAM SWMA	265,870	163,396	0.67	-	-
29	NORTHWEST COMMUNITIES OF ERIE CO.	229,853	154,587	0.67	NO	NO
30	GLEN COVE	25,000	17,229	0.69	NO	NO
31	JEFFERSON COUNTY	110,961	76,642	0.71	NO	YES
32	SCHUYLER COUNTY	18,662	13,200	0.71	NO	NO
33	SCHENECTADY COUNTY	149,283	106,241	0.71	NO	NO
34	CATTARAUGUS COUNTY	83,000	62,372	0.75	NO	NO
35	ONEIDA-HERKIMER SW AUTHORITY	316,700	236,100	0.75	YES	YES
36	COLONIE	78,000	60,840	0.78	-	-
37	ONONDAGA COUNTY RRA	463,000	368,060	0.79	NO	NO
38	NRRA SWM AUTHORITY	183,000	151,877	0.81	NO	YES
39	NEW YORK CITY	7,380,000	5,974,028	0.80	NO	NO
40	LEWIS COUNTY	26,796	22,102	0.82	NO	NO
41	HEMPSTEAD	756,000	624,630	0.83	NO	NO
42	NIAGARA COUNTY	219,859	182,398	0.83	-	-
43	HUNTINGTON	193,000	169,932	0.84	NO	NO
44	BABYLON	206,543	173,680	0.87	NO	NO
45	OUTCROSS CO. RES. RECOV. AGENCY	268,000	229,230	0.88	NO	YES
46	DELAWARE COUNTY	47,000	42,252	0.96	NO	NO
47	CAYUGA COUNTY	83,331	73,431	0.83	NO	NO
48	CHEMUNG COUNTY[4]	97,500	96,231	0.93	YES	YES
49	ADIRONDACK COUNTY SWM AUTHORITY	168,000	168,000	0.96	-	-
50	SULLIVAN COUNTY	69,000	68,701	0.97	NO	NO
51	EAST HAMPTON	16,300	16,300	1.01	NO	NO
52	WESTCHESTER COUNTY	875,000	896,000	1.02	-	-
53	SHELTER ISLAND	2,361	2,713	1.06	NO	NO
54	MONROE COUNTY	713,958	777,420	1.09	NO	YES
55	FULTON COUNTY	55,533	66,140	1.19	NO	YES
56	OSWEGO COUNTY	149,000	184,137	1.24	NO	NO
57	STEUBEN COUNTY	99,000	125,766	1.27	NO	NO
58	HAMILTON COUNTY	5,279	6,696	1.27	NO	NO
59	CHAUTAUQUA COUNTY	142,000	178,249	1.26	-	-

Notes:

(1) "-" Identifies waste management units that have been contacted, but have not responded.

(2) C & A Carbone, Inc. v. Town of Clarkstown, New York, 114 S.Ct. 1677, Decided May 16, 1994.

(3) Chenango and Chemung Counties prohibit the dumping of out-of-county waste at public landfills. They do not prohibit waste generated within the counties from leaving.

(4) Madison County implemented waste flow restrictions in February 2001. The two counties first enacted measures similar to those implemented in Oneida and Herkimer Counties.

Sources:

(1) Waste and recycling tonnages reported in the New York State Department of Environmental Conservation (NYSDEC) Recovery Matters 1994. Figures from 1995 are the most recent published data from the NYSDEC.

(2) Flow control information obtained through personal contact with regional administrators.

Exhibit 10

Documents Reviewed as of 11/15/02

Bates			Document Title
OC	7	- 7	Notice of Public Hearing
OC	8	- 8	Oneida County Executive's Letter of Approval regarding Local Law Introductory "I" of 1989 re: collection and disposition of solid waste
OC	9	- 10	Minutes of Public Hearing re: collection and disposition of solid waste
OC	12	- 25	Oneida County Board of Legislators Resolution No. 335
OC	26	- 70	Oneida County Board of Legislators Resolution No. 356
OC	124	- 126	Oneida County Executive's correspondence to Oneida County Board of Legislators re: additional material
OC	241	- 244	Oneida County Board of Legislators Resolution No. 249
OC	607	- 621	Contract of Sale between the County of Oneida and OHSWMA re: Materials Recovery Facility (MRF)
OC	901	- 903	Agreement of Lease Between County of Oneida and OHSWMA
OC	964	- 965	Oneida County Board of Legislators Resolution Approving Lease/Purchase Agreement for the Energy Recovery Facility
OC	1021	- 1022	OHSWMA correspondence to Oneida County Executive re: the disposition of the Oneida-Herkimer Materials Recovery Facility
HC	2	- 3	No. 32 Resolution of the Special Committee on SWM and the Committee on Finance Authorizing Intermunicipal Agreement for Public Education and Information Programs in Connection with SWM
HC	4	- 5	Minutes of Public Hearing re: Local Law No. 4 for 1988
HC	9	- 10	Report and Resolution of the Special Committee on Solid Waste Management
HC	19	- 19	Resolution No. 348 of the Special Committee on Solid Waste Management for the Adoption of a Service Fee Allocation Agreement

Exhibit 10

Bates			Document Title
HC	30	- 39	SEQR Positive Declaration Notice of Intent to Prepare a Draft Generic Environment Impact Statement Determination of Significance
HC	266	- 267	Revised Draft Proposed Local Law for the Collection and Disposition of Solid Waste
HC	272	- 281	Draft Herkimer County Local Law #4 of 1988 Schedule for Implementation
ACF	4	- 4	Oneida County Dept. of Solid Waste Management correspondence to Waste Management of NY re: the intent to establish transfer station
ACF	10	- 12	Oneida County Dept. of SWM letter to the Chairman of the Environmental Conservation Committee, Board of Legislators re: Draft Local Law Limiting the Importation of Solid Waste
ACF	28	- 29	Oneida County Dept. of Solid Waste Management memo to Oneida County Executive re: Long-Term Financial Analysis
ACF	35	- 37	Oneida County Dept. of Solid Waste Management correspondence re: Contractual relationship between Counties and the OSHSWMA
ACF	38	- 39	Oneida County Dept. of Solid Waste Management memo to Oneida County Executive re: New York State Mandates
ACF	42	- 43	Oneida County Dept. of Solid Waste Management correspondence re: contracts regarding the Energy Recovery Facility and Ash Landfill
ACF	49	- 49	Oneida County Dept. of Solid Waste Management correspondence to James Carey re: recyclables
ACF	51	- 57	Oneida County Dept. of Solid Waste Management correspondence to the Chairman of the Environmental Conservation Committee, Board of Legislators re: proposed minor changes to Local Law #1
ACF	66	- 66	Oneida County Dept. of Solid Waste Management memo to Oneida County Executive re: IDLP Rapoli's Regulations
ACF	86	- 89	Oneida County Dept. of Solid Waste Management correspondence to Spohn's Disposal Service re: response to waste haulers regarding representation on the Authority
ACF	90	- 91	Oneida County Dept. of Solid Waste Management correspondence to ParMacro re: Oneida County Energy Recovery Facility
A	1	- 77	OSHSWMA Solid Waste System Revenue Bonds
A	78	- 294	OSHSWMA Solid Waste System Revenue Bonds

Exhibit 10

Bates	Document Title
A 295 - 472	OSHWMA Solid Waste System Revenue Bonds
A 473 - 559	OSHWMA Solid Waste System Revenue Bonds
A 560 - 650	OSHWMA Solid Waste System Revenue Bonds
A 651 - 696	OHSWMA documents re: District Formation Authorities
A 697 - 812	OHSWMA documents re: Document Request Authority Regulations #13
A 813 - 843	NYSDOH Comprehensive Solid Waste Planning Study
A 845 - 894	Draft Solid Waste Management in Eastern Oneida and Herkimer Counties Long Range Alternatives
A 895 - 974	Solid Waste Management, Eastern Oneida and Herkimer Counties, Final Draft Report, Long Range Alternatives
A 970 - 974	Oneida County Dept. of Solid Waste Management Memo
A 975 - 979	Solid Waste Management Program, Solid Waste Practices and Citizen Attitudes Regarding Recycling in Oneida-Herkimer
A 980 - 1012	Solid Waste Management Program, Commercial and Industrial Waste Utilization Study, Oneida-Herkimer Counties
A 1013 - 1026	Draft Report to the Common Council of the City of Utica, NY and the Oneida County Department of Solid Waste Management: Billing and Payment Alternatives
A 1027 - 1045	Solid Waste Management Program, Source Separation/Recycling Program Definition
A 1046 - 1187	OHSWMA Final Generic Environmental Impact Statement and Local Solid Waste Management Plan
A 1188 - 1189	OHSWMA correspondence with Shirley Donnelly
A 1190 - 1191	Memo from Oneida County Dept. of Solid Waste Management to Chief Elected Officials and correspondence to the Mayor of the City of Utica re: Draft Generic Environmental Impact Statement

Exhibit 10

Bates	Document Title
A 1223 - 1228	Transcript of Landowners' Meeting on Preliminary Hydrogeologic Tests
A 1282 - 1287	OHSWMA Waste Control Plan for the Oneida County Energy Recovery Facility in Rome, NY
A 1288 - 1302	OHSWMA Amendments to the Local Solid Waste Management Plan
A 1303 - 1308	OHSWMA Recycling in Oneida and Herkimer Counties
A 1309 - 1323	OHSWMA Landfill Siting Methodology Final Environmental Impact Statement
A 1324 - 1328	ACAL correspondence to OHSWMA Board of Directors re: opposition to proposed landfill in the Township of Ava
A 1329 - 1355	Waste Disposal and Transportation Cost-Initial Comparison of Export Proposals and Cost Estimate for Use of Site G
A 1356 - 1359	March 1993 Solid Waste Characterization Study for OHSWMA - TOC and Conclusions
A 1360 - 1480	5/5/96 Oneida-Herkimer Counties Solid Waste Management System Draft Report - System Status and Future Alternatives
A 1481 - 1527	OHSWMA Draft Environmental Impact Statement for Site WLF-5 East
A 1545 - 1585	OHSWMA Request for Quotations for Commercial Collection Services
A 1586 - 1648	OHSWMA response to 11/13/96 comment letter from the ACOF for site WLF-5 East, proposed sanitary landfill in the Town of Ava, NY
A 1649 - 1680	State Environmental Quality Review Act Statement of Findings
A 1681 - 1764	OHSWMA Solid Waste Disposal Services, Request for Proposals (RFP)
A 1765 - 1783	OHSWMA, Oneida-Herkimer Transfer Stations RFP description of "the reserve disposal contract," a brief
A 1795 - 1820	Agreement for Design and Construction of Transfer Stations between Empire Sanitary Landfill, Inc. and OHSWMA

Exhibit 10

Bates	Document Title
A 1830 - 1831	Interim Disposal Contract Extension Agreement
A 1832 - 1859	Agreement for Interim Utilization of Landfill and Amendments 1-8
A 1861 - 1878	Construction and Demolition Debris Transportation and Processing Agreement
A 1879 - 1890	Memo re: Proposed New Disposal Contract
A 1891 - 1893	Appendix C State Environmental Quality Review Short Environmental Assessment Form for Unlisted Actions Only re: New Landfills Contract
A 1896 - 1959	Solid Waste Transporting and Disposal Agreement
A 1960 - 1962	High Acres Contract Modification and related correspondence
A 1963 - 1969	Memo from Hans G. Arnold, Exec. Dir. to Authority Board re: High Acres Option and Extension
A 1970 - 1971	Resolution No. 4 Exercise of Contract Options
A 1972 - 1974	Correspondence from R. Sturges, Waste Management of New York, LLC, to Hans G. Arnold re: Alternative Waste Disposal Facility
A 1975 - 1976	Waste Disposal Agreement, Modification re: Oneida Limited
A 1977 - 1997	Agreement for the Collection and Haul of Recyclables in the City of Utica, New York (sample contract)
A 1998 - 2014	Solid Waste Collection and Disposal Agreement between OHSWMA and Waste Management of New York (copy of sample contract between the Authority and the Haulers)
A 2015 - 2061	Memo from Comptroller to Authority Attorney re: Lowest Net Cost Analysis of Proposals for an Interim Disposal Agreement
A 2062 - 2076	OHSWMA, Report on Audited Financial Year Statements, Year Ended December 31, 1990
A 2077 - 2092	OHSWMA, Report on Audited Financial Year Statements, Year Ended December 31, 1991

Exhibit 10

Bates			Document Title
A	2093	- 2106	OHSWMA, Report on Audited Financial Year Statements, Year Ended December 31, 1992
A	2107	- 2120	OHSWMA, Report on Audited Financial Year Statements, Year Ended December 31, 1993
A	2121	- 2134	OHSWMA, Report on Audited Financial Year Statements, Year Ended December 31, 1994
A	2135	- 2147	OHSWMA, Report on Audited Financial Year Statements, Year Ended December 31, 1995
A	2148	- 2160	OHSWMA, Report on Audited Financial Year Statements, Year Ended December 31, 1996
A	2161	- 2173	OHSWMA Financial Statements and Report of Independent Certified Public Accountants 1997 and 1996
A	2174	- 2187	OHSWMA Financial Statements and Report of Independent Certified Public Accountants 1998 and 1997
A	2188	- 2202	OHSWMA Financial Statements and Report of Independent Certified Public Accountants 1999 and 1998
A	2203	- 2216	OHSWMA Financial Statements and Report of Independent Certified Public Accountants 2000 and 1999
A	2217	- 2244	OHSWMA Board Reports 2001 and 2000
A	2245	- 2325	OHSWMA 1989 Annual Report
A	2327	- 2351	OHSWMA 1990 Annual Report
A	2352	- 2383	OHSWMA 1991 Annual Report
A	2384	- 2408	OHSWMA 1992 Annual Report
A	2409	- 2452	OHSWMA 1993 Annual Report
A	2453	- 2494	OHSWMA 1994 Annual Report

Exhibit 10

Bates	Document Title
A 2495 - 2531	OHSWMA 1995 Annual Report
A 2532 - 2570	OHSWMA 1996 Annual Report
A 2571 - 2601	OHSWMA 1997 Annual Report
A 2602 - 2633	OHSWMA 1998 Annual Report
A 2634 - 2668	OHSWMA 1999 Annual Report
A 2669 - 2702	OHSWMA 2000 Annual Report
A 2703 - 2750	OHSWMA 2001 Annual Report
A 2751 - 2776	OHSWMA, Board Reports, December 2001 and 2000, 1999 through 2001
A 2777 - 2843	Memo from Comptroller to Authority Board re: 2002 Budget Package Package
A 2844 - 2858	OHSWMA, Public Comments on the Final Generic Environmental Impact Statement and Local Solid Waste Management Plan, Volume 9, Appendix N
A 2859 - 2891	OHSWMA, Transcript of Public Comment Meeting re: Environmental Report on Candidate Landfill Sites
A 2893 - 2898	OHSWMA, Transcript of Authority Meeting re: Draft Environmental Impact Statement on Proposed Landfill
A 2899 - 2922	OHSWMA, Transcript of Authority Meeting re: Draft Environmental Impact Statement on Proposed Landfill
A 2923 - 3016	Exhibit DD, Hearing Transcript and Written Comments, OHSWMA Final Environmental Impact for Site WLE 5 East, a Proposed Sanitary Landfill in the Town of AVA, New York
A 3017 - 3043	NYSDEC and United States Army Corps of Engineers, Transcript of Joint Legislative Hearing
A 3062 - 3064	NYSDEC Issues Conference re: Proposed Landfill Site in Ava, New York, August 28 & 29, 2000

Exhibit 10

Bates	Document Title
A 3063 - 3070	Resolution No. 26 - Approval of O-HSWM Budget
A 3071 - 3079	OHSWMA 1991 Budget File
A 3080 - 3099	OHSWMA 1992 Budget File
A 3100 - 3111	OHSWMA 1993 Budget File
A 3112 - 3123	OHSWMA 1994 Budget File
A 3124 - 3135	OHSWMA 1996 Budget File
A 3141 - 3151	OHSWMA 1997 Budget File
A 3152 - 3168	OHSWMA 1998 Budget File
A 3169 - 3233	OHSWMA 1999-2000 Budget File
A 3234 - 3307	OHSWMA 2000 Budget File
A 3308 - 3308	Cross-reference to 1991 Revenue & Appropriations report
A 3309 - 3432	1999 Quarterly Financial Reports
A 3433 - 3560	2000 Quarterly Financial Reports
A 3561 - 3696	2001 Quarterly Financial Reports
A 3697 - 3763	2002 Quarterly Financial Reports
A 3764 - 3774	1990 Revenue/Appropriation Analysis

Exhibit 10

Bates	Document Title
A 3775 - 3790	1992 Revenue/Appropriation Analysis
A 3791 - 3803	1993 Revenue/Appropriation Analysis
A 3804 - 3815	1994 Revenue/Appropriation Analysis
A 3816 - 3831	1995 Revenue/Appropriation Analysis
A 3832 - 3849	1996 Revenue/Appropriation Analysis
A 3850 - 3867	1997 Revenue/Appropriation Analysis
A 3868 - 3886	1998 Revenue/Appropriation Analysis
A 3887 - 3888	OHSWMA letter to residents and businesses regarding Oneida and Herkimer County Recycling
A 3889 - 3904	OHSWA Memorandum re: Contract Recyclables
A 3905 - 3905	Estimated 2000 Population Distribution (Map)
A 3906 - 3906	Areas Served by Existing Waste Disposal (Map)
A 3907 - 3907	Main Transportation Facilities (Map)
A 3908 - 3917	Draft Environmental Impact Statement, Oneida County Energy Recovery Facility, Rome, NY
A 3919 - 3932 ~	March 1976 Recovery of Energy and Materials from Solid Waste, proposal by the Oneida County Solid Waste Agency
A 3934 - 3935	Information re: Oneida County Department of Solid Waste Management Energy Recovery Facility
A 3936 - 3943	Oneida-Herkimer Counties Material Recovery Facility, Analysis of Direct Authority Operation Versus Indirect Authority Operation Through Private Contractor

Exhibit 10

Bates	Document Title
A 3944 - 3963	Analysis of Potential Debt Restructuring and ERF Acquisition
A 3964 - 4074	Agreement of Sub-Sublease, County of Oneida Landlord, O-HSWMA-Tenant, dated as of 1/1/90 re: Landfill, Teaberry Road, Rome, NY
A 4075 - 4094	ERF Lease Payment Construction Costs Documents
A 4095 - 4130	Draft Report - April 1994 Energy Recovery Facility Future Options
A 4134 - 4136	Documents re: Purchase of Land Occupied by the Ash Landfill
.	Affidavit of Jeff Bliss of Bliss Enterprises, Inc.
.	Affidavit of Marcella Guerriero of Transfer Systems, Inc.
.	Argument descriptors of United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority from law.com
.	Affidavit of David Levitt of Levitt's Commercial Containers, Inc.
.	Defendant County of Herkimer's Answer
.	Letter and Index of Documents from Kevin Murphy
.	Index of documents sent by Devorsetz Strazzano
.	Correspondence from OHSWMA's attorney regarding discovery issues
.	Affidavit in Opposition of Hans G. Arnold
.	County of Oneida, NY Single Audit Reports for the year ended 12/31/89
.	United Haulers Association, Inc. v. O-HSWMA, County of Oneida, County of Herkimer 261 F. 3d 245 (2d Cir 2001)

Exhibit 10

Bates	Document Title
	County of Oneida, NY Financial Statements for the years ending 12/31/91 through 12/31/01 (inclusive)
	Defendant County of Oneida's Answer
	Documents re. sale of Materials Recovery Facility (Bates No. OC 00640-652; 782-784; 812-814; 844-845).
	Summons and Verified Complaint
	Cover Letter and TOC from Devorsetz Stenzano
	Index of documents produced by Oneida-Herkimer Solid Waste Management Authority (OHSWMA)
	County of Oneida, NY Financial Statements for the year ending 12/31/90
	County of Herkimer, NY General Purpose Financial Statements for 1991 (full report) and 1992-1996 and 1998-2001 (internet pages).
	Bonding Documents (Bates No. OC 325-331; 333-3[illegible] 602-605; 678; 684; 713-714)
	Defendant O-HSWMA's Answer

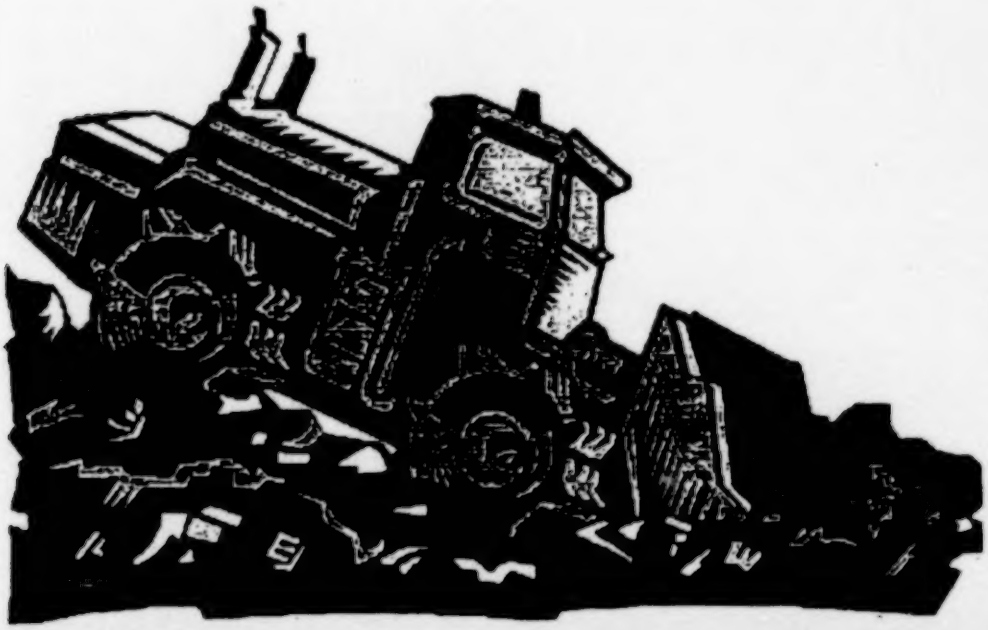
NSWMA Research Bulletin 02-01 February 2002

Interstate Movement Of Municipal Solid Waste

By Edward W. Repa, Ph.D.

Since the late 1980s, a number of states have been concerned about the amount of solid waste they were receiving from out-of-state sources for disposal. Some states attempted to pass legislation that would regulate these flows. However, federal courts declared that any such restrictions were unconstitutional. At the same time, Congress considered, but did not pass, numerous bills that would have provided states with the authority to control interstate waste shipments.

Because of the continuing congressional interest in interstate waste shipments, Congress in 1990 requested that the Congressional Research Service (CRS) determine the amount of municipal solid waste (MSW) moving interstate. CRS has updated its interstate report five times, most recently in 2001. This report summarizes the information collected by CRS on the movement of MSW interstate and provides data from select states that have reported interstate MSW flows since the publication of the 2001 CRS report.



National Trends

Figure 1 shows the growth in MSW exports and imports based on the CRS data. The import and export data follow similar trends; however, the data are not equal because of problems with the way states collect the data. According to CRS's 1990 report, about 12.6 million tons of MSW were exported in 1989 and 10.8 million tons of MSW were imported. The amount of MSW exported and imported by states has nearly tripled over the last 11 years. Exports between 1989 and 2000 rose to more than 31.1 million tons, almost a 150 percent increase, and imports rose to more than 32.1 million tons, almost a 200 percent increase.

Table 1 provides MSW exports and imports by state and the percent of a state's MSW exports or imports based on the state's generation rate (i.e., imports or exports divided by generation). On average, less than 8 percent of the waste generated in the United States was exported to another state for disposal in 2000 and about 9 percent of the waste was imported by another state for disposal.

State Trends

Figure 2 shows the extensive and intricate web of interstate MSW movements in 2000 between states and across U.S. borders with Canada and Mexico. The CRS data identified 135 waste interactions, where an interaction is the movement of MSW between two states or countries as an import or export. More than 135 interactions occurred in 2000; however, the CRS report did not provide data that identified these additional interactions. For example, Ohio provided information to CRS that it received MSW shipments from 10 identified states, but also received shipments from 22 other states that were not identified.

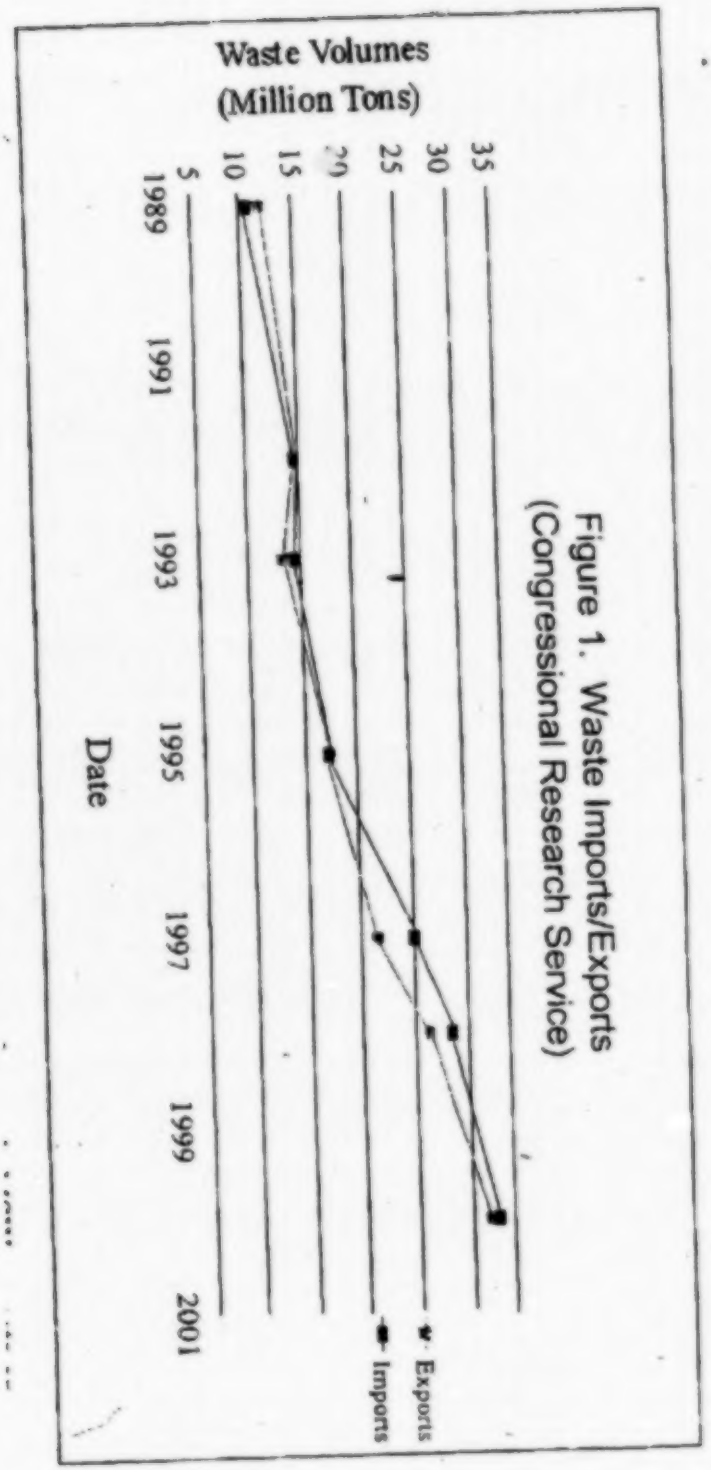


Figure 1. Waste Imports/Exports
(Congressional Research Service)

Of the 135 waste interactions, 113 (84%) were between neighboring states. Furthermore, 68 (50%) of the 135 interactions were paired interactions, where MSW moved as both an import and export between the same two neighboring states. These same trends were reported in previous CRS studies on interstate waste movements.

Exports

In 1989, CRS found that only 13 states and the District of Columbia exported waste to another state for disposal. As the waste volumes increased over the years, so did the number of states exporting waste. In 2000, the number of states exporting waste had grown to 47 plus the District of Columbia, 2 Canadian provinces, and Mexico.

Based on CRS's data for the year 2000 that is presented in Table 1 and Figure 3:

- Eight states exported more than one million tons including California, Illinois, Maryland, Missouri, New Jersey, New York, North Carolina, and Ohio. The number of states exporting more than a million tons of MSW per year doubled in 2000 compared to 1989 when four states (Missouri, New Jersey, New York, and Pennsylvania) exported more than a million tons per year of MSW.
- The state exporting the largest volume of MSW in 2000 was New York (6.8 million tons) followed closely by New Jersey (4.2 million tons).
- Three states (Indiana, Massachusetts, and Washington) and the District of Columbia exported between 0.75 million tons and 1.00 million tons of MSW in 2000.

Table 1. Municipal Solid Waste Imports and Exports by State

State	MSW Generated[1] (10^6 tons/yr)	MSW Imports[1] (10^6 tons)	Percent Imports of Generation	MSW Exports[1] (10^6 tons)	Percent Exports of Generation	Net (Imports-Exports) (10^6 tons)
AL	5.0	0.210	3.8	0.035	1.9	0.175
AK	0.625	0.000	0.0	0.025	4.1	-0.025
AZ	4.4	0.605	2.4	Negl.[3]	---	0.676
AR	2.7	Negl.	---	0.054	2.0	-0.054
CA	46.0	0.011	>0.1	1.195	1.8	-1.184
CO	3.9	Negl.	---	0.015	0.4	-0.015
CT	3.2	0.240	7.5	0.554	17.3	-0.314
DE	0.820	0.000	0.0	0.025	3.1	-0.025
DC	0.1	0.000	0.0	0.979	99.0	-0.979
FL	24.6	Negl.	---	0.250	1.2	-0.250
GA	9.7	0.516	5.3	0.250	2.6	0.266
HI	2.0	0.000	0.0	0.000	0.0	0.000
ID	0.794	0.018	2.3	0.066	8.3	-0.048
IL	15.1	1.547	10.2	3.749	20.8	-1.684
IN	9.5	1.419	14.1	0.909	9.6	0.551
IA	3.8	0.525	13.8	0.380	10.0	0.105
KS	3.2	0.454	13.6	0.043	1.3	0.391
KY	5.4	0.627	11.6	0.094	1.7	0.533
LA	3.9	Negl.	---	0.309	7.7	-0.309
ME	1.9	0.165	8.7	0.051	5.0	0.114
MD	5.8	0.065	0.9	1.791	24.1	-1.725
MA	8.1	0.029	0.4	0.985	12.2	-0.956
MI	15.6	2.849	18.2	0.085	0.5	2.755
MN	5.6	Negl.	---	0.620	11.1	-0.620
MS	3.1	0.459	14.9	Negl.	---	0.459
MO	10.3	0.183	1.8	1.793	17.4	-1.610
MT	0.988	0.032	3.2	Negl.	---	0.032
NE	1.8	0.121	6.8	0.015	1.0	0.106
NV	3.5	0.541	15.5	0.000	0.0	0.541
NH	1.1	0.539	47.5	0.064	3.9	0.475
NJ	8.7	0.838	9.6	4.159	47.8	-3.322
NM	2.1	0.242	7.8	0.000	0.0	0.242
NY	29.9	0.559	1.8	6.807	22.9	-6.248
NC	10.2	0.042	0.4	1.107	10.9	-1.065
ND	0.507	0.054	10.5	Negl.	---	0.054
OH	13.1	1.374	13.5	1.049	7.9	0.324
OK	3.6	Negl.	---	Negl.	---	0.000
OR	4.4	1.249	28.1	0.016	0.4	1.232
PA	14.1	12.238	85.6	0.554	3.9	11.684
RI	0.621	0.000	0.0	0.147	24.7	-0.147
SC	4.6	0.383	10.0	0.057	1.2	0.806
SD	0.647	Negl.	---	Negl.	---	0.000
TN	5.3	0.297	5.6	0.151	2.8	0.146
TX	28.4	0.047	0.1	0.395	1.1	-0.348
UT	2.6	0.295	11.2	0.001	>0.1	0.065
VT	0.557	0.000	0.0	0.065	15.9	-0.065
VA	12.6	1.891	26.7	0.150	1.4	3.741
WA	5.7	0.243	5.0	0.852	10.1	0.389
WV	1.5	0.250	16.7	0.195	20.1	0.055
WI	5.9	1.068	28.9	0.251	6.8	0.817
WY	0.568	Negl.	---	Negl.	---	0.000
Total/Avg.	384.739	35.681	9.2	29.87	7.7	

1. Waste News (July 23, 2001)
2. Congressional Research Service (July 19, 2001)
3. Negl. = Negligible or very small amounts

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Figure 2. Interstate Shipment of Municipal Solid Waste in 2000 (CRS, 2001)
Note: Map does not include transactions with the District of Columbia.

- Thirteen states (Connecticut, Florida, Georgia, Iowa, Louisiana, Minnesota, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, West Virginia, and Wisconsin) had exports that were less than 0.75 million tons, but greater than 0.10 million tons.
- Twenty-three states (Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Idaho, Kansas, Kentucky, Maine, Michigan, Mississippi, Montana, Nebraska, New Hampshire, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Vermont, and Wyoming) exported less than 100,000 tons.
- Three states (Hawaii, Nevada, and New Mexico) did not export MSW for disposal to another state.

Only the District of Columbia exported more than 50 percent (89%) of the MSW it generated, with the remainder of the MSW being recycled. This export rate is attributable to the District's lack of disposal capacity within its jurisdiction. New Jersey had the next highest export rate at almost 48 percent followed by Rhode Island at almost 35 percent. All other states had export rates of less than 30 percent of their generation rates. The majority of the exporting states (27 states) exported less than or equal to 10 percent of the MSW that they generated including the states of Alabama, Alaska, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Nebraska, New Hampshire, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, and Wisconsin. Seven states (Arizona, Mississippi, Montana, North Dakota, Oklahoma, South Dakota, and Wyoming) reportedly had exports, but the quantity of the exports was negligible. These seven states likely had exports that were also less than 10 percent of their waste generation rates.

Figure 3. Municipal Solid Waste Exports (2000)



Imports

In 1989, 14 states imported waste for disposal. By the year 2000, 45 states were importing MSW for disposal. The largest importer of MSW was Pennsylvania (12.2 million tons) followed by Virginia (3.9 million tons) and Michigan (2.8 million tons). Based on the year 2000 data presented in Table 1 and Figure 4:

- Eight states imported more than 1 million tons of MSW including Illinois, Indiana, Michigan, Ohio, Oregon, Pennsylvania, Virginia, and Wisconsin. In 1989, only Illinois, Indiana, Ohio, and Pennsylvania imported more than 1 million tons of MSW.
- Twenty states (Alabama, Arizona, Connecticut, Georgia, Iowa, Kansas, Kentucky, Maine, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, South Carolina, Tennessee, Washington, and West Virginia) imported less than 1.0 million tons, but greater than 0.1 million tons.
- Seventeen states (Arkansas, California, Colorado, Florida, Idaho, Louisiana, Maryland, Massachusetts, Minnesota, Montana, North Carolina, North Dakota, Oklahoma, South Dakota, Texas, Utah, and Wyoming) imported less than 100,000 tons of MSW.
- Only 5 states (Alaska, Delaware, Hawaii, Rhode Island, and Vermont) and the District of Columbia did not import MSW for disposal.

Figure 4. Municipal Solid Waste Imports (2000)



Pennsylvania, with the highest volumes of imports, also had the largest amount of imported waste compared to waste generated. Pennsylvania's imports were almost as large as the amount of waste it generated (85.6%) in 2000. Four states had import rates greater than 20 percent when compared to generation rates including New Hampshire (41.5%), Virginia (36.7%), Wisconsin (28.9%), and Oregon (25.1%). Twenty states (Alabama, Arizona, California, Connecticut, Georgia, Idaho, Maine, Maryland, Massachusetts, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, Tennessee, Texas, Utah, and Washington) imported less than 10 percent of the waste they generated.

Net Imports and Exports

Table 1 and Figure 5 contain data on the net volumes of imports and exports (i.e., import volumes minus export volumes) of MSW by state for the year 2000. The data showed:

- Four states had net imports greater than 1 million tons. Pennsylvania was the largest net importer at 11.684 million tons followed by Virginia at 3.741 million tons, Michigan at 2.755 million tons, and Oregon at 1.222 million tons.
- Six states (Indiana, Kentucky, Nevada, Ohio, South Carolina, and Wisconsin) had net imports greater than 500,000 tons, but less than 1 million tons.
- Three states (Massachusetts, Minnesota, and Washington) and the District of Columbia had net exports greater than 500,000 tons, but less than 1 million tons.
- Seven states and Ontario, Canada, had net exports greater than 1 million tons. New York was the largest net exporter at 6.268 million tons, followed by New Jersey at 3.322 million tons, Maryland at 1.729 million

tons, Missouri at 1.610 million tons, Illinois at 1.604 million tons, Ontario at 1.278 million tons, California at 1.184 million tons, and North Carolina at 1.065 million tons.



Figure 5. Net Imports and Exports

As shown in Figure 5, the majority of the states had net imports or exports that were less than 500,000 tons. In fact, 14 states had net imports or exports that were less than 100,000 tons including Alaska, Arkansas, Colorado, Delaware, Hawaii, Idaho, Montana, North Dakota, Oklahoma, South Dakota, Utah, Vermont, West Virginia, and Wyoming.

New Data

A number of states released their 2001 interstate data or revised their 2000 data since the publication of the CRS report. The new or revised import data for the states showed that:

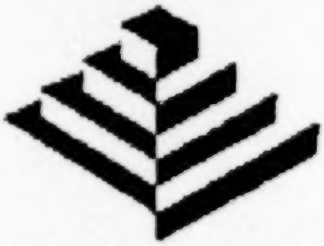
- Indiana imported 1.608 million tons of MSW in 2001 from California, Georgia, Iowa, Illinois, Kansas, Kentucky, Michigan, Missouri, New Jersey, Nevada, Ohio, Tennessee, Texas, Virginia, and Wisconsin. This is 169,000 tons (12%) more waste than in 2000 and an additional 10 states that exported waste to the state for disposal.
- Michigan imported 3.116 million tons of MSW in 2001 from Canada, Illinois, New Jersey, New York, Ohio, Pennsylvania, and Wisconsin. This is 284,000 tons (10%) more waste than in 2000 and an additional 2 states exported waste to Michigan for disposal.
- Ohio revised the list of states that it imported waste from in 2000 to include Alaska, Arkansas, Arizona, California, Connecticut, District of Columbia, Delaware, Georgia, Iowa, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Maryland, Maine, Michigan, Montana, North Carolina, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, Virgin Islands, Vermont, Washington, Wisconsin, West Virginia, and other

unidentified states. This is an additional 22 states that exported waste to Ohio for disposal.

- Virginia revised the list of states that it imported waste from in 2000 to include Alabama, Arkansas, Canada, Connecticut, District of Columbia, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Massachusetts, Maryland, Michigan, North Carolina, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Tennessee, Utah, Wisconsin, and West Virginia. This is an additional 17 states that exported waste to Virginia for disposal.

Based on historical and new data, the amount of MSW moving interstate for disposal will again increase in 2001. Also, the number of states either exporting or importing waste is actually greater than that reported in the CRS report because states are reporting data to CRS before a complete analysis is available or the states' records are incomplete.

This Research Bulletin was produced and is copywrited by the National Solid Wastes Management Association (NSWMA), a part of the Environmental Industry Associations. NSWMA is a non-profit trade association representing for-profit companies in the solid waste business.



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Washington, D.C. 20008
800-424-2869

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF ONEIDA)

DAVID N. LEVITT, being duly sworn, deposes and says as follows:

1. I am the Vice President of Levitt's Commercial Containers, Inc. ("Levitt's"), a plaintiff in the above-captioned action, and I make this affidavit in support of the plaintiff's motion for summary judgment declaring the unconstitutionality of flow control in Oneida and Herkimer Counties under the Commerce Clause of the United State's Constitution.

2. Levitt's is a New York Corporation with its principal place of business located at 867 Route 5 in Utica, New York. Levitt's has been engaged in the collection, transport, processing and disposal of solid waste generated or brought within the Counties of Oneida and Herkimer since 1905 and I have served as Vice-President of the company since early 1985.

3. I am fully familiar with the rules and regulations of the Oneida-Herkimer Solid Waste Management Authority ("Authority") and the flow control laws enacted by Herkimer and Oneida Counties (hereinafter collectively referred to as "Counties"). I am also fully aware of the restrictions imposed on my company with regard to the disposal and/or processing of solid waste.

4. Levitt's is the largest privately owned hauling company in the Counties and 99% of its business comes from customers in the Counties. Levitt's services commercial, residential, municipal, industrial and institutional customers. The mainstay of Levitt's business is construction and demolition debris ("C&D debris").

5. Pursuant to the Counties' flow control ordinances and the Authority's rules and regulations, Levitt's is required to transport its customers' waste to Solid Waste Management - Resource Recovery Facilities ("Facilities") owned and/or operated by the Authority in Oneida County for processing and/or disposal. Accordingly, Levitt's must transport any and all solid waste (excluding recyclables and green waste) collected in the Counties to the Ash Landfill in Rome, New York, the Energy Recovery Facility ("ERF") in Rome, New York or the Authority's Transfer Station in Utica, New York. Recyclables, on the other hand, must be brought to the Authority's Recycling Center in Utica, New York and green waste must be brought to the Authority's Green Waste Compost Facility in Utica, New York (unless it is privately composted).

6. In February 1993, the Executive Director of the Authority, Hans Arnold, contacted me and my brother Andrew and asked us to come to an important meeting. We were not informed at that time what the meeting was about. At the meeting, we were verbally attacked for hauling C&D debris to the Seneca Meadows Landfill in Waterloo, New York. The Seneca Meadows Landfill is located outside the

Counties and is not owned or operated by the Authority. The Authority told us that the shipment of waste, including C&D debris, out of the Counties violated flow control. Because Levitt's is a licensed and permitted facility which can accept C&D debris for the sorting of recyclables, it had always been Levitt's practice -- prior to February 1993 -- to collect C&D debris from its customers, dump it at our facility, sort out the recyclables and transfer the unrecyclable residue or salvage on our transfer trailers to other facilities for further recycling. The Authority did not own or operate a facility with equipment capable of recycling C&D debris so we sent it out-of-County. Because the Authority found that this business practice violated flow control, Levitt's was assessed a fine of $5,000 to each County (for a total fine of $10,000) and was forced to discontinue the shipment of C&D debris to out-of-County sites. While Levitt's paid the first $5,000 of the fine, it has not paid the second installment due to the recent decision in C&A Carbone, Inc. v. Town of Clarkstown, 114 S.Ct. 1677 (1994). I am familiar with this decision which, I understand, struck down a flow control ordinance requiring the delivery of all nonhazardous solid waste within or generated within a town to a transfer station located within that town.

7. Subsequent to Carbone, the Authority agreed that Levitt's did not have to pay the remaining $5,000 fine but they refused to refund the $5,000 portion of the fine Levitt's had already paid. Moreover, they verbally agreed that, from that point on, C&D debris could be hauled to Facilities outside the Counties so long as the C&D debris was being put to a better use than the Authority could put it (i.e., if it was being recycled rather than disposed). This verbal representation has never been reduced to writing nor have the flow control laws been amended to reflect this understanding. In any event, C&D debris cannot be disposed at Facilities located outside the Counties.

8. Also subsequent to the decision in Carbone, a meeting was held between a number of haulers, including Levitt's, the Authority's attorney, Philip Rayhill, and the Authority's Executive Director, Hans Arnold. During this meeting, which I personally attended in December of 1994, the Authority's attorney stated that the Authority still intended to enforce flow control and did not view Carbone as an impediment to such enforcement. The Authority stated that flow control would be enforced and threatened us with fines, penalties and revocation of our permits if we did not deliver waste collected in the Counties to Authority-designated Facilities in the Counties.

9. The Authority has "garbage cops" who follow Levitt's trucks, take pictures and monitor Levitt's disposal and hauling practices to ensure compliance with flow control.

10. But for the flow control restrictions, Levitt's could transport solid waste out of the county and out-of-state for processing and/or disposal at a lower cost than it is incurring at the Authority's Facilities. For example, the Authority charges a minimum of $86.00 per ton of solid waste as its tipping fee, while the Seneca Meadows Landfill in Waterloo, New York charges only $40 per ton of solid waste. The Seneca Meadows Landfill is located approximately 90 miles outside of Oneida County. Accordingly, Levitt's could transport 30 tons of solid waste to the landfill on its transfer trailers at a cost of approximately $90-$100 (or $3.00 to $3.33 per ton). The total cost of disposal at the Seneca Meadows Landfill, therefore, would not exceed $43.33 per ton (inclusive of transportation costs) for a total savings of approximately $43 per ton -- a 50% savings.

11. Moreover, solid waste collected from Levitt's customers in the Counties could otherwise be disposed at landfills in New Jersey, Massachusetts, Connecticut, Pennsylvania, Ohio and as far south as Virginia at a lower

cost that Levitt's now incurs at the Authority's Facilities in Oneida County.

12. For example, a few years ago my company was approached by a landfill operator in Virginia who was willing to transport the waste collected by Levitt's in the Counties by rail to his Virginia landfill at a total cost (inclusive of rail fees) of approximately $55 per ton, which was significantly less than the $88 per ton being charged by the Authority at that time. Because of flow control, Levitt's was not able to pursue or accept this deal.

13. Moreover, the Chambers Development Company, Inc. ("Chambers") owns and operates 15 landfills in the eastern half of the United States, with landfills in Florida, Maryland, Mississippi, West Virginia, Georgia, Virginia, South Carolina and Pennsylvania. Attached hereto as Exhibit A is a company description and a map of landfills sent to me by Chambers in January of this year. Levitt's can dispose of its customers' waste at Chambers' Dauphin Meadows Landfill in Millersburg, Pennsylvania for $32 per ton with additional transportation costs of approximately $9.30 per ton for a total cost of $41.30 per ton. This is fifty-two percent (52%) less than Levitt's must pay to dispose of waste at Authority facilities. Attached hereto as Exhibit B is a Chambers' specification sheet describing the Dauphin Meadows Landfill.

14. Chambers has also offered to allow Levitt's to dispose of its County waste at its Southern Alleghenies Landfill in Hulsopple, Pennsylvania at a cost of $22 per ton. Again, even after transportation costs of approximately $15 per ton are included, Levitt's would save 57% per ton of waste if it could use its transfer trailers to dispose of County waste at this out-of-state landfill. Attached hereto as Exhibit C is a Chambers specification sheet for the Southern Alleghenies Landfill.

15. Attached hereto as Exhibit D is a January 11, 1995 letter to Levitt's from Chambers and two Landfill Disposal Agreements (which were enclosed with the letter) evidencing the disposal costs and terms offered to my company.

16. Indeed, because of flow control, Levitt's can haul waste to the Empire Landfill in Pennsylvania only if it pays a surcharge to the Authority for each hauled ton of waste. But for flow control, Levitt's could haul to this out-of-state landfill without having to pay this extremely high surcharge.

17. The flow control laws also require the shipment of recyclables to the Authority's Recycling Center. The Authority, however, does not pay any sums for the recyclables it receives despite the existence of a strong recyclables market. In other words, recyclables brought to the Recycling Center could otherwise be sold on the open market.

18. The Recyclables market for corrugated cardboard and paper is very strong due in large part to (1) the packaging industry's increased use of corrugated cardboard; and (2) the earthquake disaster in Japan which has created a heavy overseas demand for cardboard and paper because Japan lacks its own raw materials.

19. While flow control as written applies to both residential and commercial recyclables, the Authority has verbally indicated that it will not enforce flow control against commercial recyclables. The Authority has never reduced this understanding to writing nor have the flow control laws been amended to address this issue. Accordingly, the Authority could choose to begin enforcing flow control against both residential and commercial recyclables under the current state of the law. Enforcement against commercial recyclables would significantly impact my company because we bale our commercial recyclables on-site and sell it by the ton to recycling companies.

20. The flow control laws are preventing Levitt's from transporting waste out of the Counties and out-of-state for disposal and/or processing. As a result, the flow control laws are forcing Levitt's to pay excessive tipping fees to the Authority which are above competitive market levels. Some of this cost is, of necessity, transferred to Levitt's customers while the rest of the cost is absorbed by Levitt's, thus impacting Levitt's profit margin on each load of solid waste collected in the Counties.

21. Because Levitt's annually collects approximately 12,000 tons of solid waste from its customers in the Counties, flow control is preventing a significant amount of waste from crossing the Counties' borders and entering the interstate market.

22. There are no processing or disposal Facilities in the Counties other than facilities owned and/or operated by the Authority.

23. Based on the availability of other disposal and processing facilities in New York and out-of-state, all of which have lower tipping fees than the Authority's Facilities, Levitt's does not perceive a need for the construction of a new landfill located in the Counties.

/s/ David N. Levitt
DAVID N. LEVITT

Sworn to before me this
2nd day of June, 1995

/s/ Maureen G. Croop
Notary Public

Maureen G. Croop
Notary Public, State of New York
Qualified in Oneida County
My Commission Expires: Oct. 31, 1995

CHAMBERS

The Company

Chambers Development Company, Inc. is one of the largest environmental service companies in the United States. The company offers a full range of services in the collection, hauling, recycling, transfer and disposal of non-hazardous municipal and residual waste.

With more than 20 years experience, Chambers is a recognized leader in the industry, committed to providing environmentally safe disposal and the highest quality service to its customers at competitive prices. The company has also compiled one of the industry's best environmental records.

Locations

Today, Chambers services approximately 200 municipalities and nearly 28,000 commercial and industrial customers throughout the eastern one-half of the United States.

The company is headquartered in Pittsburgh, PA and has operations in 12 states.

Landfills

Chambers owns and operates 15 landfills: one in Florida, Maryland, Mississippi and West Virginia; two in Georgia, Virginia and South Carolina; and five in Pennsylvania.

The combined permitted capacity of these sites exceeds 118 million tons, and more than 13,000 tons of waste are disposed in them each day.

Collection & Hauling

The company has collection and hauling operations in Atlanta and Cedartown, GA; Lake, MS; Atlantic City, NJ; Charlotte, NC; East Cleveland, OH; Washington, Pittsburgh, Johnstown, Portage, Harrisburg and Easton, PA; Columbia and Orangeburg, SC; and Norfolk and Richmond, VA.

Transfer Stations

Chambers owns or operates ten transfer stations: four in New Jersey – two in Morris County, one in Hunterdon County and Atlantic City; two in Richmond, VA; and one in East Cleveland, OH, Altoona, PA, Norfolk, VA and Fairfield County, SC.

Recycling & Waste-to-Energy

The company provides recycling collection services to thousands of commercial and residential customers. Chambers also owns/operates a recycling facility in Newport News, VA, and a waste-to-energy facility in Hampton, SC.

Revenue

Annual revenues for 1993 approximated $288.5 million.

Stock

Chambers' stock is publicly traded on the American Stock Exchange. The ticker symbols are CDVA for Class A Common Stock and CDVB for Common Stock.

The Quality *Plus* Choice

CHAMBERS' SYSTEM OF LANDFILLS



CHAMBERS OWNS OR OPERATES 15 LANDFILLS SERVING THE EASTERN HALF OF THE UNITED STATES.

[redacted]
- Chambers' Arden Landfill (Washington)
- Chambers' Dauphin Meadows Landfill (Millersburg)
- Chambers' Laurel Highlands Landfill (Cambria County)
- Chambers' Monroeville Landfill
- Chambers' Southern Alleghenies Landfill (Hollsopple)

[redacted]
- Chambers' Mountainview Landfill (Frostburg)

[redacted]
- Chambers' Charles City Landfill
- Chambers' Maplewood Landfill (Amelia County)

[redacted]
- Chambers' LCS Landfill (Berkley County)

[redacted]
- Chambers' Incineration Facility (Hampton)
- Chambers' Oakridge Landfill (Dorchester County)
- Chambers' Richland County Landfill

[redacted]
- Chambers' Clearview Landfill (Lake)

[redacted]
- Chambers' Atlanta Landfill
- Chambers' Smyrna Landfill

[redacted]
- Chambers' Okeechobee Landfill

CHAMBERS **The Quality *Plus* Choice**

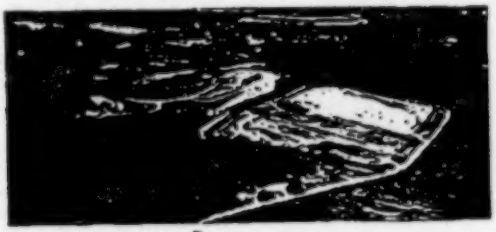
[redacted]

CHAMBERS' DAUPHIN MEADOWS LANDFILL

Millersburg,
Pennsylvania

LOCATION: Located in Dauphin County, PA approximately 35 miles north of Harrisburg.

MAILING ADDRESS: Route 209, R.D. #1, P.O. Box 68, Millersburg, PA 17061
PHONE, FAX: 717-362-3056 717-362-8642 (FAX)



Aerial view of Dauphin Meadows Landfill

ACREAGE: 51.2 permitted acres – 14.8 acre permitted disposal area.

PERMITTED CAPACITY: 750 tons/day (average) – 1,000 tons/day (maximum).

PERMIT INFORMATION: Pennsylvania Department of Environmental Resources Solid Waste Permit #101539 and several earth and water resource protection permits.
Permittee: Dauphin Meadows, Inc., a wholly-owned subsidiary of Chambers Development Company, Inc.

ACCEPTABLE WASTES: Municipal solid waste, construction/demolition waste, asbestos, and pre-approved, non-hazardous industrial/residual waste such as contaminated soil, processed medical waste and sludges.

UNACCEPTABLE WASTES: Free liquids and hazardous waste.

HOURS OF OPERATION: Monday - Friday 6:15 a.m. - 4:00 p.m.
Saturday 7:00 a.m. - 11:00 a.m.
Flexible hours are available.

The Quality *Plus* Choice

CHAMBERS' DAUPHIN MEADOWS LANDFILL



SECURITY: Single access point with video camera and perimeter fencing, random inspections of incoming loads. Special waste verification lab on-site.

LINER SYSTEM: 60 mil HDPE primary liner with bentonite matting, 60 mil HDPE secondary liner with six inch compacted soil sub-base.

OTHER ENVIRONMENTAL PROTECTION SYSTEMS: Leachate collection and detection system, 2.2 million gallon leachate storage facility, leachate treated at an on-site treatment facility. Landfill gas monitoring probes surrounding the facility are monitored monthly. Thirteen monitoring wells sampled quarterly.

TRANSPORTATION: Easy truck access via I-81. An affiliated hauling company is available for local collection and transportation services at 717-545-4219.

For additional information call 1-800-333-8813.

The Quality *Plus* Choice

CHAMBERS' SOUTHERN ALLEGHENIES LANDFILL

Holsopple, Pennsylvania

LOCATION: Located in Somerset County, PA approximately 10 miles south of Johnstown.

MAILING ADDRESS: R.D. #3, Box 310, Holsopple, PA 15935
PHONE, FAX: 814-479-2537 814-479-2708 (FAX)



Aerial view of Southern Alleghenies Landfill

ACREAGE: 170 permitted acres – 43.4 acre permitted disposal area.
51.5 acre future expansion of disposal area.

PERMITTED CAPACITY: 2,200 tons/day (average) – 3,300 tons/day (maximum)

PERMIT INFORMATION: Pennsylvania Department of Environmental Resources Solid Waste Permit #100081, and several earth and water resource protection permits. Permittee: Southern Alleghenies Disposal Service, Inc., a wholly-owned subsidiary of Chambers Development Company, Inc.

ACCEPTABLE WASTES: Municipal solid waste, construction/demolition waste, asbestos, and pre-approved, non-hazardous industrial/residual waste such as contaminated soil, processed medical waste and sludges.

UNACCEPTABLE WASTES: Hazardous waste and free liquids.

HOURS OF OPERATION: Monday - Friday 8:00 a.m. - 4:00 p.m.
Saturday 8:00 a.m. - 12:00 p.m.
Flexible operating hours available.

CHAMBERS The Quality *Plus* Choice

CHAMBERS' SOUTHERN ALLEGHENIES LANDFILL



SECURITY: Single access point with video camera, natural barriers with perimeter fencing, and random inspections of incoming loads. Full-time local township waste inspector. Special waste verification lab on-site.

LINER SYSTEM: Two 60 mil HDPE synthetic liners over six inch compacted soil sub-base.

OTHER ENVIRONMENTAL PROTECTION SYSTEMS: Leachate collection and detection systems; leachate treated at on-site treatment facility. Landfill gas managed via a network of 42 monitoring probes around perimeter of site. Landfill gas is extracted and piped to a ground flare station where it is destroyed. Twenty-three groundwater monitoring wells surrounding the site and four surface water points are tested quarterly.

TRANSPORTATION: Easy truck access to the site via SR 219. Rail transportation of waste can also be arranged. Unloading capabilities for boxvans. An affiliated hauling company is available for local collection and transportation service at 814-479-4011.

For additional information call 1-800-333-8813.

The Quality *Plus* Choice

CHAMBERS
DEVELOPMENT COMPANY, INC.
Environmental protection. Service. Value

January 11, 1995

Mr. David Levitt
Levitt's Commercial Containers, Inc.
867 Route 5
Utica, NY 13502

SUBJECT: **Landfill Disposal Agreement**
Municipal Solid Waste - Oneida County, CT

Dear Mr. Levitt:

Thank you for your interest in Chambers Development Company, Inc. to dispose of Municipal Solid Waste. Enclosed are two Landfill Disposal Agreements for your review and signature.

Our Special Waste sales department is responsible for selling landfill disposal capacity to generators of such wastes as contaminated soils, ash, sludges, or other non-hazardous industrial wastes. Our double-lined landfills in Pennsylvania, Maryland, West Virginia, and Virginia provide an environmentally safe disposal for non-hazardous industrial wastes - an excellent alternative to costly hazardous waste sites and unsafe local dumps. We are also able to arrange for transportation of this waste to our sites upon Customer request.

Our permits require that we have a fully-executed Landfill Disposal Agreement on file prior to acceptance of waste at our landfills. Upon receipt of the signed Disposal Agreement, I will obtain the proper Chambers approvals and see that a copy is returned for your records. Also enclosed for your completion is a credit application, which must be completed and returned to me at your earliest convenience.

We look forward to your business. If you should have any questions or require additional information, please contact Mike Greenfield at 914/328-2895 or myself at 800/333-9915. Thank you.

Sincerely,

Nancy L. Moses
Inside Sales Representative

Enclosure

cc: Mike Greenfield
klagrw

CHAMBERS

LANDFILL DISPOSAL AGREEMENT
NON-HAZARDOUS WASTES

COMPANY:

Dauphin Meadows, Inc. Landfill
R.D. 1 Route 209
Millersburg, PA 17061

Contract Number: 0798

CUSTOMER:

Company Name: Levitt's Commercial Containers, Inc.

Address: 867 Route 5 Tax I.D. No.

City: Utica State: NY Zip: 13502 County: Oneida

Contact: David Levitt Telephone: 315/726-0026 315/726-4188 P.O. #

1. Solid Waste Disposal. Subject to the terms and conditions contained herein, the Company agrees to accept at its landfill (the "Landfill") Acceptable Waste as defined in Paragraph 2 hereof (collectively, "Waste") delivered by Customer.

2. Acceptable Waste. The following types of waste are the only types of waste which the Company will accept at the Landfill, and Customer agrees that it shall not dispose of any waste not specifically listed below:

(a) Municipal Solid Waste (c)

(b) (d)

Acceptable Waste specifically excludes hazardous, explosive, highly flammable, infectious, pathological, radioactive, municipal, toxic or illegal waste, as defined under any applicable law or regulation. No waste other than those types specifically provided for herein, will be acceptable for disposal at the Landfill. In addition, all Waste delivered to the Company for disposal must conform to all applicable federal, state and local laws, regulations, rules and orders relating at any time to the transportation and disposal of Waste.

3. Rates for Disposal.

Type of Waste	Volume	Rate	Type of Waste	Volume	Rate
MSW	22 tons/day	$32.00 per ton	* Contract may begin 3/01/95 pending completion of landfill expansion.		

County and State of Origin of Waste: Oneida, NY Disposal Quantity (per week): 110 tons

4. Term of Agreement. This Agreement is effective for twelve (12) months, commencing 3/01/95 *. The disposal rates herein may be adjusted by the Company upon thirty (30) days' prior written notice.

COMPANY AND CUSTOMER IN CONSIDERATION OF THE MUTUAL OBLIGATIONS CONTAINED HEREIN, AGREE THIS IS A LEGALLY BINDING AGREEMENT WHICH IS SUBJECT TO THE TERMS AND CONDITIONS ON THE REVERSE SIDE OF THIS DOCUMENT.

Customer	Company
Levitt's Commercial Containers, Inc.	Dauphin Meadows, Inc. Landfill
	Randy Sylvester
	General Manager

FOR COMPANY USE ONLY

Cust. # Region Unit 9027/NH LC Type Interest (y/n)

Credit Limit Remittance Code Alpha Sort

Contract Review Reason

LANDFILL - WHITE CUSTOMER - PINK YELLOW GREEN

CHAMBERS

LANDFILL DISPOSAL AGREEMENT
NON-HAZARDOUS WASTES

COMPANY:
Southern Alleghenies Disposal Service, Inc.
R.D. 3, Box 310
Valley View Drive
Hollsopple, PA 15935

Contract Number: 0797

CUSTOMER:
Company Name: Levitt's Commercial Containers, Inc.
Address: 867 Route 5 Tax I.D. No.
City: Utica- State: NY Zip: 13502 County:
Contact: David Levitt Telephone: 315/724-0024 315/724-6148 P.O. #

1. Solid Waste Disposal. Subject to the terms and conditions contained herein, the Company agrees to accept at its landfill (the "Landfill") Acceptable Waste as defined in Paragraph 2 hereof (collectively, "Waste") delivered by Customer.

2. Acceptable Waste. The following types of waste are the only types of waste which the Company will accept at the Landfill, and Customer agrees that it shall not dispose of any waste not specifically listed below:

(a) Municipal Solid Waste (c)
(b) (d)

Acceptable Waste specifically excludes hazardous, explosive, highly flammable, infectious, pathological, radioactive, residual, toxic or illegal waste, as defined under any applicable law or regulation. No waste other than those types specifically provided for herein, will be acceptable for disposal at the Landfill. In addition, all Waste delivered to the Company for disposal must conform to all applicable federal, state and local laws, regulations, rules and orders relating at any time to the transportation and disposal of Waste.

3. Rates for Disposal.

Type of Waste	Volume	Rate	Type of Waste	Volume	Rate
MSW	22 tons/day	$22.00 per ton			

County and State of Origin of Waste: Oneida, NY Disposal Quantity (per week): 110 tons

4. Term of Agreement. This Agreement is effective for twelve (12) months, commencing 1/12/95. The disposal rates herein may be adjusted by the Company upon thirty (30) days' prior written notice.

COMPANY AND CUSTOMER IN CONSIDERATION OF THE MUTUAL OBLIGATIONS CONTAINED HEREIN, AGREE THIS IS A LEGALLY BINDING AGREEMENT WHICH IS SUBJECT TO THE TERMS AND CONDITIONS ON THE REVERSE SIDE OF THIS DOCUMENT.

Customer
Levitt's Commercial Containers, Inc.
(Signature, Authorized Representative)
(Print Name)
Title
Date

Company
Southern Alleghenies Disposal Service, Inc.
(Signature, Authorized Representative)
(Print Name)
Paul Keszel
Title
General Manager
Date

FOR COMPANY USE ONLY
Cust. # Region Unit 9927/HN LC Type Interest (y/n)
Credit Limit Remittance Code Alpha Sort
Contract Review Reason

LANDFILL - WHITE CUSTOMER - PINK YELLOW GREEN

A-297

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF ONEIDA)

JEFF BLISS, being duly sworn, deposes and says as follows:

1. I am the president of Bliss Enterprises, Inc. ("Bliss"), a plaintiff in the above-captioned action, and I make this affidavit in support of the Plaintiffs' motion for summary judgment declaring the unconstitutionality of flow control in Oneida and Herkimer Counties under the Commerce Clause of the United States Constitution.

2. Bliss is a New York corporation with its principal place of business located at R.D. 2 Hillsboro Road in Camden, New York. Bliss has engaged in the collection, transport, processing and disposal of solid waste generated or brought within the Counties of Oneida and Herkimer since 1948.

3. I am fully familiar with the rules and regulations of the Oneida-Herkimer Solid Waste Management Authority ("Authority") and the flow control laws enacted by Herkimer and Oneida Counties (hereinafter collectively referred to as the "Counties"). Having engaged in the solid waste business in the Counties for the past 47 years, I am aware of the

restrictions imposed on my company with regard to the disposal and/or processing of solid waste.

4. Bliss services residential, industrial, commercial and institutional customers in Oneida and Herkimer Counties. Pursuant to the Counties' flow control ordinances and the Authority's rules and regulations, all waste collected by Bliss from customers in Oneida or Herkimer Counties must be transported to one of the Authority's Solid Waste Management-Resource Recovery facilities ("Facilities") in Oneida County for processing and/or disposal. Accordingly, all solid waste collected in the Counties (excluding recyclables and green waste) must be transported to the Ash Landfill located in Rome, New York, the Energy Recovery Facility ("ERF") in Rome, New York or the Authority's Transfer Station located in Utica, New York. Recyclables, on the other hand, must be brought to the Oneida-Herkimer Recycling Center in Utica, New York while yard or green waste must be brought to the Authority's Green Waste Compost Facility in Utica, New York (unless it is privately composted).

5. The Authority has also verbally stated to me that construction and demolition ("C&D") debris can be brought to the Seneca Meadows Landfill in Waterloo, New York, so long as it is brought there for recycling.

6. The Authority has established tipping fees for the disposal of solid waste and recyclables through the issuance of rules and regulations. The Authority's 1995 Rules and Regulations, which were sent to Bliss by the Authority, state that the 1995 tipping fee for solid waste is $86.00 per ton. A copy of the Authority's 1995 Rules and Regulations is attached hereto as Exhibit A. If witnessed disposal is required or if the solid waste load contains greater that 25 percent recyclables, the tipping fee doubles to $172.00 per ton. The Authority determines whether or not there is greater than 25

percent recyclables by merely eying the waste load and making a discretionary determination.

7. Pursuant to the Authority's 1995 Rules and Regulations, the tipping fee for the disposal of C&D debris is $67.00 per ton at the Transfer Station and $40.00 per ton at the Ash Landfill. The tipping fee increases to $86.00 per ton if the C&D material is mixed in with solid waste and the tipping fee doubles to $172.00 per ton if the C&D material is mixed with greater than 25 percent recyclables. Again, whether tipping fees are increased is within the sole discretion of the Authority and there are no set standards or methods by which to make this determination.

8. The tipping fee for the disposal of C&D debris at the Seneca Meadows Landfill is only $35 per ton (or 48% less than that charged at the Authority's Transfer Station). The tipping fee for the disposal of other solid waste at the Seneca Meadows Landfill is only $40 per ton (or 54% less than that charged at the Authority's Transfer Station). The Seneca Meadows Landfill is approximately 90 miles outside of Oneida County.

9. The Authority's 1995 Rules and Regulations also establish a $10.00 per ton fee for green or yard waste, with a minimum disposal fee of $5.00 per load up to 1,000 lbs. There is no tipping fee for recyclables brought to the Recycling Center, so long as the loads delivered do not contain significant amounts of unacceptable material. Nor does the Authority pay for recyclables received at the Recycling Center despite the value of such materials on the open market.

10. If Bliss was not subject to flow control, it could transport its customers' waste for processing and/or disposal to facilities located both out of the Counties and out-of-state at significantly lower cost. Moreover, it could sell recyclables on the open market for a profit rather than having to dispose of them at the Recycling Center.

11. It costs Plaintiffs $86 per ton of solid waste to dispose of waste at the Authority's Transfer Station, which is operated by Empire Sanitary Landfill, Inc. ("ESL, Inc."). ESL, Inc. subsequently hauls this material from the Transfer Station to its landfill in Taylor, Pennsylvania at a charge to the Authority of $56 per ton. The Authority has advised my company that we can bypass the Transfer Station and haul directly to the Empire Landfill in Pennsylvania but must still pay the Authority a $31 surcharge in addition to the tipping fee charged by ESL, Inc. In the absence of flow control, therefore, Bliss could directly dispose of waste at the Empire Landfill without paying the $31 per ton surcharge. Moreover, instead of paying $86 per ton of solid waste at the Transfer Station, Bliss would only pay $55 per ton at the Empire Landfill plus transportation costs of approximately $15 per ton (for a total disposal fee of $70 per ton) if flow control did not exist.

12. Bliss owns a 23½ ton transfer trailer capable of transporting solid waste from the Counties to out-of-state Facilities. In addition to using these transfer trailers for hauls to the Empire Landfill in Taylor, Pennsylvania and other facilities in the Northeast, Bliss could economically and legally transport C&D debris to Bill Frank, Inc. in Youngstown, Ohio at a disposal cost of $1.80 per yard. One transfer trailer holds 100 yards of C&D debris and it would cost approximately $800 in transportation costs to haul this amount of material to Ohio on our trucks. Accordingly, it would cost $980 to dispose of 100 yards (or 25 tons) of C&D debris in Youngstown, Ohio which is equivalent to $39.20 per ton. This would be approximately 42% less expensive than the cost of disposing of C&D debris at the Authority's Transfer Station 15 miles down the road.

13. While Bliss has a ten year C&D disposal contract with Bill Frank, Inc. which terminates in December of 2002, and is therefore grandfathered from enforcement of the Flow Control Laws pending the existence of the contract, other

haulers do not have such contracts and are, therefore, prohibited from bringing C&D debris to Ohio.

14. I am familiar with the United States Supreme Court's recent ruling in C&A Carbone, Inc. v. Town of Clarkstown, 114 S.Ct. 1677 (1994). It is my understanding that in this case the Supreme Court invalidated a flow control ordinance requiring the delivery of all nonhazardous solid waste within or generated within a town to a transfer station located within that town. Following the Supreme Court's ruling in Carbone, a meeting was held between the Authority and a number of waste haulers, including Bliss. I personally attended that meeting and was advised by the Authority — through its attorney Philip Rayhill and its executive director Hans Arnold — that the Authority still intended to enforce flow control in the Counties and that the Authority did not view Carbone as an obstacle to such enforcement. Indeed, Philip Rayhill, Esq. advised us all that we would not be issued 1995 permits if we refused to bring our waste to the Authority's Facilities.

15. The Authority uses "garbage cops" to monitor activities of haulers — including Bliss — in the Counties to ensure compliance with flow control. The Authority also keeps records of waste disposal practices to ensure compliance. Indeed, on May 31, 1995, the Authority wrote me a letter threatening to "initiate" an action against me for alleged violations of the Oneida Law and the Authority's "own requirements" regarding flow control. A copy of the Authority's May 31, 1995 letter to me is attached hereto as Exhibit B.

16. The flow control laws are preventing Bliss from transporting waste out of the Counties and out-of-state for disposal and/or processing. As a result, the flow control laws are forcing Bliss to pay excessive tipping fees to the Authority which are above competitive market levels. Some of this cost is, of necessity, transferred to Bliss's customers

while the rest of the cost is absorbed by Bliss, thus impacting Bliss's profit margin on each load of solid waste collected in the Counties.

17. There are no processing or disposal facilities in the Counties other than facilities owned and/or operated by the Authority.

18. Based on the availability of other disposal and processing facilities in New York and Pennsylvania, all of which have lower tipping fees than the Authority's facilities, Bliss does not perceive a need for the construction of a new landfill located in the Counties.

/s/Jeff Bliss
Jeff Bliss

Sworn to before me this
7th day of June, 1995
/s/ Beth A. Carle
Notary Public

ONEIDA - HERKIMER SOLD WASTE AUTHORITY

FACILITIES

1995

RULES AND REGULATIONS FOR

ASH LANDFILL

ENERGY RECOVERY FACILITY

GREEN WASTE COMPOST FACILITY

HOUSEHOLD HAZARDOUS WASTE COLLECTION FACILITY

RECYCLING CENTER

TRANSFER STATION

Oneida Herkimer Solid Waste Authority
311 Turner Street - Suite #401
Utica, New York 13501
733-1224

ONEIDA - HERKIMER SOLID WASTE AUTHORITY

FACILITIES

RULES AND REGULATIONS FOR

ASH LANDFILL
ENERGY RECOVERY FACILITY
GREEN WASTE COMPOST FACILITY
HOUSEHOLD HAZARDOUS WASTE COLLECTION FACILITY
RECYCLING CENTER
TRANSFER STATION

GENERAL RULES AND REGULATIONS:

1. All haulers shall obtain a Solid Waste Collection and Disposal Permit from the Authority pursuant to the Oneida and Herkimer County Local Laws. **Permits shall be valid from January 1, 1995 through December 31st of 1996**. No proration of permit fees will occur for permits issued after January 1, 1995. Permit renewal applications must be completed and submitted as soon as possible to insure no lapse in permit.

2. Haulers shall provide all pertinent information regarding their company or municipality, vehicles and routes as required by the Authority Solid Waste and Recyclable Collection and Disposal Permit.

3. Individual companies or businesses which haul solid waste, recyclables generated on their own property and which are not a commercial hauler as defined by County Local Law shall obtain a $ 10.00 permit decal only and the $ 50.00 permit fee will be waived.

4. All vehicles utilizing any facility shall have a readily visible Authority permit decal on the **driver's side**

front bumper. Vehicles without permits will not be accepted at the facility.

5. All haulers are required to follow the instructions given to them by Authority employees or their designee directing the tipping operations. Failure to obey instructions may result in the loss of disposal privileges.

6. There is absolutely no smoking at any of the Authority Facilities. All vehicles should be equipped with spark arresting mufflers.

7. The Authority will not pay for any vehicle damage allegedly caused by poor road conditions or debris in the road, yard or in any of the Authority Facilities.

8. Haulers must deliver all acceptable solid waste and curbside collected recyclables generated within Oneida and Herkimer Counties to an Authority designated facility.

9. Haulers and vehicles must comply with the applicable rules and regulations currently enforced by:

   Oneida and Herkimer Counties
   Oneida-Herkimer Solid Waste Authority (OHSWA)
   NYS Department of Environmental Conservation (NYSDEC)
   NYS Department of Motor Vehicles (DMV)
   NYS Department of Transportation (DOT)

10. Minimum liability insurance coverage of $ 500,000.00 is required for all commercial haulers using the facilities.

11. All vehicles must have their material properly contained or tarped. Vehicles with material not properly contained will be requested by the scale house operators to immediately leave the facility. For front end loaded and rear end loaded trucks, this

means no loose solid waste on the vehicle. For roll off containers, pick up trucks, etc., this means loads must be tarped to contain the material. This is a NYSDEC/NYSDOT and Authority regulation. Loads of residual waste to be transported directly to Empire Sanitary Landfill in Pennsylvania must be tarped or covered according to Pennsylvania DER specifications.

12. The Authority has the right to direct solid waste from the Energy Recovery Facility, the Ash Landfill or Transfer Station to the appropriate facility according to waste production, waste origin, waste type, seasonal fluctuations or planned operating procedures. Every effort will be made to give haulers at least a one day notice if this is to occur.

13. Drivers must **STOP** their vehicles before driving onto the scales. Drivers must obey the respective lights governing scale operations for the entrance to the facility.

14. Drivers must remain in their vehicles while on the scales.

15. All haulers shall properly maintain collection vehicles.

16. All haulers shall allow their waste to be inspected as the material is being dumped.

WASTE HANDLING INFORMATION

General Information:

1. Haulers must provide a completed tracking document from all designated industries, hospitals and nursing homes on that load before the delivery of solid waste to the Transfer Station, Energy Recovery Facility and Ash Landfill.

2. Loads of solid waste delivered at the Transfer Station, Energy Recovery Facility and Ash Landfill that contain, in the opinion of the Authority or their designee, greater than 25% recyclable material will be subject to penalty.

3. Haulers are allowed in the Tipping Floor Area only. General public and haulers are not allowed in the processing area of the facilities without consent of the Plant Manager.

4. Loads of solid waste delivered to the Transfer Station, Energy Recovery Facility and Ash Landfill that contain, in the opinion of the Authority or their designee, unacceptable solid waste, regulated medical waste or hazardous waste will not be accepted.

5. Haulers shall assist the Authority to the maximum extent possible in identifying the generator of hazardous or unacceptable waste if such waste is discovered in their refuse load. Hazardous waste identified as coming from a specific hauler will be returned to that hauler for disposal. This action will also be reported to the NYS DEC.

6. The Authority will require that all Haulers utilize the designated access route patterns to the Transfer Station, Recycling Center and Compost Site as defined below. Truck traffic from areas north, south and west of the Transfer Station will access the facilities via Route 12 to Route 1-790 to Leland Avenue. Trucks from Herkimer County will access the site via Route 5s to North Genesee Street to Wurz Avenue and finally to Leland Avenue. Only local collections vehicles will be allowed on Herkimer Road (Route 5) and Genesee Street south of the Wurz Avenue entrance.

7. Refuse loads, which in the opinion of the Authority contain a majority of waste which is noncombustible, slightly combustible, hardfill, large objects or hazardous waste as defined by the New York State Department Environmental Conservation, will not be accepted at the Energy Recovery Facility. However, if waste is redirected from the Transfer Station to the Energy Recovery Facility during periods of low waste production or operational procedures, solid waste loads with some incompatible material will be accepted. Examples of waste that will not be accepted are construction debris, large pieces of wood and vegetation, and furniture.

8. All container recyclables shall be delivered to the Recycling Center either loose or in see through. plastic bags only. No brown kraft paper bags will be accepted with the containers. All paper recyclables shall be delivered in either brown kraft bags, see through plastic bags or bundled with twine or string. Junk mail should be placed in a see through plastic bags and tied.

9. Green waste accepted at the compost facility is defined as grass, leaves, brush, garden debris and limbs under 12 inches in diameter and no more than 6 feet in length. No other material will be accepted. Absolutely no scrap metal, recyclables or any other material should be delivered to the Compost Site. Loads of material, which in the opinion of the Authority contains non-green waste will be rejected.

10. Compost Site users should deliver material either loose or separated into either brush and limb loads, leaves or grass loads, reasonable mixed loads will be allowed. **Bagged material is not acceptable. No bags should be delivered to the site.**

11. Used motor vehicle tires will be accepted at the Recycling Center in Utica and the Energy Recovery Facility in Rome in accordance with the fees for service resolution dated **12/12/94**.

ONEIDA - HERKIMER SOLID WASTE AUTHORITY CREDIT POLICY

The following is the credit policy updated as of July 1, 1994, that will be in place for disposal of solid waste at all Authority's facilities.

1. The Authority will send the hauler a bill at the beginning of the month for the previous month's disposal. For example: For all solid waste that is delivered to the Transfer Station or ERF during December, a bill will be mailed at the beginning of January.

2. The Authority must be in receipt of this money by the hauler by the 25th of the month following the month of disposal. In the example #1, the money must be received by the Authority by January 25th.

3. If the Authority does not receive the money by the 25th (or next business day if it's a weekend or holiday), the hauler will be assessed an automatic 2% penalty. This penalty will be added to the amount due from the hauler.

4. If the Authority does not receive the money by the 30th of the month, the hauler can be placed on C.O.D. until all monies due to the Authority are paid.

5. If the Authority does not receive all monies by the first week of the month following the month that a penalty is assessed, the hauler can be denied use of any Authority facilities.

FEES FOR SERVICE 1995

The following fees for service was established by the Oneida Herkimer Solid Waste Authority Board according to Resolution # 12 **dated 12/12/94**.

1. Vehicles shall have their disposal fees based on weight of municipal solid waste at the scales of the Transfer Station and Energy Recovery Facility for disposal. Such fees are approved by the Authority annually.

Solid Waste Disposal Fee:

$ 86.00 per ton of solid waste

$ 172.00 per ton of material requiring witnessed disposal.

$ 172.00 per ton for solid waste containing greater than 25% recyclables in a solid waste load.

Construction & Demolition Debris Disposal Fee:

$ 67.00 per ton of material

$ 25.00 per ton of select construction and demolition debris (Also see Ash Landfill Special Conditions)

$ 67.00 per ton of mixed select construction and demolition debris and construction and demolition debris.

$ 86.00 per ton of mixed construction and demolition debris and solid waste

$ 172.00 per ton for mixed construction and demolition debris containing greater than 25% recyclables in construction and demolition debris load.

Virgin Petroleum Contaminated Boil Disposal Fee:

$ 60.00 per ton (all Authority application and analytical requirements must be met prior to the disposal of virgin petroleum contaminated soils)

Residual Waste (as defined by PADER)
Disposal Fee:

$ 86.00 per ton through Authority Facilities

$ 61.50 per ton for loads taken directly to Empire Sanitary Landfill by Hauler.

Recycling Center Fee:

No charge for Residential Recycling

Green Waste Composting Disposal Fee:

$ 10.00 per ton

Tire Disposal Fee:

Up to 16 inch	$1.00 each
700 to 900 series	$2.00 each
900 series to 11.20 series	$5.00 each
Larger series	$.15 per pound
Bulk tires	$100.00 per ton

Add $2.00 per tire if on a rim

Household Appliance Disposal Fee:

$5.00 per item for white goods (i.e. washers, dryers, dishwashers, hot water heaters)

$ 10.00 per item for freezers, refrigerators or any item that contains CFCs.

Minimum Disposal Fee:

$ 15.00 per load of municipal solid waste up to 250 lbs.

$ 10.00 per load of C & D and household furniture (i.e. chairs, couches, mattresses, beds, box springs . televisions, stereo components) up to 250 lbs.

$ 4.00 per 35 gallon bag of normal solid waste

$ 86.00 per truck of material requiring witnessed disposal.

$ 5.00 per load of private company generated green waste up to 1000 lbs. Homeowners will not be charged a minimum disposal fee for green waste.

Used Motor Oil, Oil Filters and Antifreeze:

No charge for Used Motor Oil, Oil Filters & Antifreeze from residents.

Automobile Battery Disposal Fee:

No charge for Automobile Batteries from residents.

Household Hazardous Waste:

No charge for household hazardous waste from residents delivering material to the Household Hazardous Waste Collection Facility. The Facility is open to residents on select Saturdays, April through September, 10 AM to 2 PM

Disposal fees will be charged for acceptable hazardous waste from approved conditionally exempt small quantity generators (CESQG). All CESQG must be approved prior to delivering waste to the Facility. Disposal fees will vary depending upon type & quantity of waste.

Recyclable Material in Loads of Solid Waste:

The solid waste disposal fee for loads of material which in the opinion of the Authority contain at least 25 % recyclable material and which are being delivered for disposal not recycling, shall be $ 172.00 per ton

Solid Waste Contaminants in Loads of Recyclable Material:

The processing fee for loads of material which are being delivered for recycling and, in the opinion of the Authority

contain significant amounts of unacceptable material shall be $ 86.00 per ton.

HOURS OF OPERATION: Effective on 1/02/95 (SUBJECT TO CHANGE UPON NOTICE)

Transfer Station

The normal hours of operation of the Transfer Station are 5:00 a.m. to 4:00 p.m. Monday through Friday, and Saturday 5:00 a.m. to 8:00 a.m. These hours are subject to adjustment to accommodate seasonal changes in garbage production, local haulers and operational considerations. Solid waste will be accepted Monday through Saturday except Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Day and New Years Day. No refuse will be accepted on Sundays.

Energy Recovery Facility

The normal hours of operation of the Energy Recover Facility are 8:00 a.m. to 4:00 p.m. Monday through Friday, and Saturday 9:00 a.m. to 1:00 p.m. These hours are subject to adjustment to accommodate seasonal changes in garbage production, local haulers and operational considerations. Solid waste will be accepted Monday through Saturday except Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Day and New Years Day. No refuse will be accepted on Sundays. It should be noted the Authority intends to cease incineration of refuse at the Energy Recovery Facility by the end of March 1995.

Ash Landfill (See Special Conditions)

The normal hours of operation of the Ash Landfill are 8:00 a.m. to 3:30 p.m. Monday through Friday. All material that is being directed to this facility must be weighed at the Energy Recovery Facility in Rome no later than 3:00 p.m. The Ash Landfill will not accept any material at that site after 3:30 p.m. Solid waste will be accepted Monday through

Friday except Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Day and New Years Day.

HOURS OF OPERATION: Effective on 1/02/95 (SUBJECT TO CHANGE UPON NOTICE)

Recycling Center Facility

The normal hours of operation of the Recycling Center are 8:00 a.m. to 4:00 p.m. Monday through Friday. Recyclables will be accepted Monday through Friday except Thanksgiving Day, Christmas Day and New Years Day. No recyclable material or compost will be accepted on Saturdays and Sundays.

Green Waste Compost Facility

The normal hours of operation of the Green Waste Compost Facility are 8:00 a.m. to 4:00 p.m. Monday through Friday. Green Waste will be accepted Monday through Friday except Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Day and New Years Day. The hours of operation are subject to adjustment to accommodate seasonal changes, local haulers and operational considerations. No green waste will be accepted on Saturdays and Sundays from commercial haulers.

Haulers requiring services outside of these time periods must make prior special arrangements with facility management.

Holiday Dates in 1995

New Years Day	Sunday	January 1, 1995
Memorial Day	Monday	May 29, 1995
Independence Day	Tuesday	July 4, 1995
Labor Day	Monday	September 4, 1995
Thanksgiving Day	Thursday	November 23, 1995
Christmas Day	Monday	December 25, 1995

Ash Landfill Special Conditions:

Special Conditions For Disposal of C & D Material At The Ash Landfill Only

A tipping fee of $ 40.00 per ton for C & D material has been established with the following conditions:

1. The C & D material must be delivered to the Oneida County Ash Landfill on Tannery Road in Rome.
2. The vehicle route to the Ash Landfill shall be Rt # 49 through the City of Roma to Oswego Road to Tannery Road.
3. The hauler must be in good standing and have a valid 1995 -1996 Solid Waste Hauling Permit vehicle decal.
4. The hauler must weight-in and out at the Oneida - Herkimer Energy Recovery (ERF) Facility on River Road in Rome.
5. The ERF Scale House hours of operation are from 8:00-AM to 4:00 PM, Monday through Friday.
6. The Ash Landfill hours of operation to receive C & D material will be from 8:00 AM to 3:30 PM.
7. Large demolition protects will require advanced notification to the Authority Office to assist in delivery and scheduling arrangements.
8. 10 Wheel Dump Trucks and Roll off Vehicles are recommended.
9. Due to the limited vehicle maneuvering space, large dump trailers and transfer trailers will also require advanced notification prior to delivery.
10. All vehicles must be properly tarped.
11. Only construction and demolition debris as defined by NYS Department of Environmental Conservation will be allowed of at the Ash Landfill.

12. C & D material shall not contain putrescible solid waste or recyclable material.

13. The C & D material tipping fee at the Transfer Station in Utica will remain at $ 67.00 per ton.

14. C & D material will be accepted at the Ash Landfill contingent on how long disposal capacity is available at that facility.

15. The Authority has the right to close the Ash Landfill due weather or wind problems at that facility without prior notice.

16. Any hauler requiring services outside of these conditions must make prior special arrangements with Authority management.

Ash Landfill Special Conditions:

C & D MATERIAL INSPECTION PROCEDURES

C & D Inspection And Delivery Procedure:

1. The Authority Staff will visually inspect construction and demolition debris waste loads delivered for disposal at the Ash Landfill.

2. If a C & D load contains less than 10 % of non C & D material (in the judgment of the Authority) the load will be charged the applicable C & D rate of $ 40.00 per ton. **This 10 % non C & D material shall not contain any putrescible solid waste or recyclable material.**

3. If a C & D load contains over 10% non C&D material (in the judgment of the Authority) the load will be charged the applicable Solid Waste rate of $ 86.00 per ton. **This 10 % non C & D material shall not contain any putrescible solid waste or recyclable material.**

4. If a C & D load contains over 25 % recyclable material, (such as corrugated cardboard) the load will be charged

the applicable Solid Waste rate for material that contains excessive recyclables of $ 172.00 per ton.

The Oneida - Herkimer Solid Waste Authority will use the New York State DEC Part 360 "Construction and Demolition Debris" Definition to describe Construction and Demolition Debris.

> "**Construction and demolition debris**" means uncontaminated solid waste resulting from construction, remolding, repair and demolition of structures and roads; and uncontaminated solid waste consisting of vegetation resulting from land clearing and grubbing, utility line maintenance and seasonal and storm-related cleanup. Such waste includes, but is not limited to, bricks, concrete and other masonry materials, soil rock, wood wall coverings, plaster, drywall, plumbing fixtures, nonasbestos insulation, roofing shingles, asphalt pavement, glass, plastics that are not sealed in a manner that conceals other wastes, electrical wiring and components containing no hazardous liquids, and metals that are incidental to any of the above. Solid waste that is not construction and demolition debris (even if resulting from the construction, remodeling, repair, and demolition of structures and roads and land clearing) includes, but is not limited to, asbestos waste, garbage, corrugated container board, electrical fixtures containing hazardous liquids such as fluorescent light ballasts or transformers, carpeting, furniture, appliances, tires, drums and containers, and fuel tanks.

ONEIDA - HERKIMER SOLID WASTE AUTHORITY

311 Turner Street Suite 401
Utica, New York 13501
(315) 733-1224

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Hans G. Arnold,
Executive Director
Jodi M. Tuttle,
Authority Secretary

May 31, 1995

Jeffrey Bliss
Bliss Rubbish Removal Service
RD #2, Hillsboro Road
Camden, NY 13316

Dear Mr. Bliss:

A review of our records indicate that you have delivered no waste on 17 of the last 18 business days and no recyclables on 14 of the last 18 business days. This raises the issue of compliance with various provisions of Oneida County Local Lawn. of 1990 as well as our own requirements.

Before we initiate any action, I would appreciate any explanation you may offer.

Sincerely,

/S/

Hans G. Arnold
Executive Director

HGA/aag

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

AFFIDAVIT

STATE OF NEW YORK)

): ss.:

COUNTY OF ONEIDA)

MARCELLA GUERRIERO, being duly sworn, deposes and says as follows:

1. I am the president of Transfer Systems, Inc. ("TSI"), a Plaintiff in the above-captioned action, and I make this affidavit in support of the Plaintiffs' motion for summary judgment declaring the unconstitutionality of flow control in Oneida and Herkimer Counties under the Commerce Clause of the United States Constitution.

2. TSI is a New York corporation with its principal place of business located at R.D. 2, Dyke Road in Frankfort, New York. TSI has engaged in the collection, transport and disposal of solid waste generated or brought within the Counties of Oneida and Herkimer since 1992.

3. Homestand Land Corporation operates the Greentree Landfill in Toby, Pennsylvania. By letter, dated March 10, 1995, Homestand informed me that it would accept municipal waste from the Counties at the Greentree Landfill for a tipping fee of approximately $26.00 to $30.00 per ton (fees included). A copy of the March 10, 1995 letter is attached hereto as Exhibit A. Even after the inclusion of transportation costs, TSI could transport and/or dispose of

County waste at the Greentree Landfill at a significantly lower cost than is incurred at the Authority's Facilities.

4. I have also received correspondence, dated March 21, 1995, stating that Waste Management, Inc. operates eight landfills in various locations throughout the Commonwealth of Pennsylvania which are available for the disposal of waste from the Counties. Attached hereto as Exhibit B is a copy of the March 21, 1995 letter from Waste Management, Inc.

/S/
MARCELLA GUERRIERO

Sworn to before me this
7th day of June, 1995
/S/[illegible]
Notary Public

HOMESTAND LAND CORP.
GREENTREE LANDFILL
635 Toby Road
Kersey, PA 15848
(814) 265-1744
FAX: (314) 205-6745

March 10, 1995

Ms. Marcella Guerriero
TSI Transfer Station
R.D. #2 Pyke Road
Frankfort, NY 13340

Dear Ms. Guerriero:

Please be advised that Browning-Ferris Industries of Pennsylvania, Inc. is capable of accepting Municipal Waste from Central New York state at our Greentree Landfill. The Landfill is located on Route 219, approximately 10 miles north of Brookway, PA.

The current tipping fee for the Municipal Waste would be $26.00 to $30.00 per ton (fees included), depending on volumes received.

Feel free to call with any questions.

Sincerely,

/S/

Thomas E. Latimer
District Manager

TEL:tmc

Waste Management, Inc.
[address illegible]

March 21, 1995

Ms. Marcella Guerriero
TSI Transfer Station
RD 2 Dyke Road
Frankfort, NY 13340

Dear Ms. Guerriero:

I am writing in response to your request regarding disposal options available to haulers in the Utica, New York area. For your information, Waste Management operates eight (08) landfills in various locations throughout the Commonwealth of Pennsylvania. Disposal rates charged by those landfills vary depending on the market area. If you are interested in disposal options in Pennsylvania, we are available to negotiate a formal disposal agreement with specified rates.

Sincerely,

/S/

Samuel M. Lybrand
Division President - Disposal
Services & Brokerage

SML/cl

cc: Louis Promuto
Greg Sangalls
Ben Victory

ONEIDA - HERKIMER SOLID WASTE AUTHORITY
1600 Genesee Street, Utica, NY 13502
(315)733-1224
web site: http://www.ohswa.org

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Jodi M. Tuttle
Authority Secretary

February 1, 2001

Mr. Richard Lynch
Oneida Indian Nation
579 Main Street
Oneida, NY 13421

Dear Mr. Lynch:

Thanks for taking my call last week. As I thought about our conversation and since I haven't heard from you, I thought I'd take a minute to follow-up.

At the outset, let me say that I have no intent to interfere with any current contract you may have for collection and disposition of waste and recyclables. If you do not now have a contract then I'd hope we could come to a mutually beneficial resolution of your solid waste management needs. If you do have a current contract, I would ask for the

opportunity to discuss some ideas that may be beneficial to the Nation once your current contract concludes.

We are looking for an arrangement with the Nation that is wholly consistent with the Nation's policies to employ environmentally sound practices and utilize local infrastructure where possible.

The Solid Waste Authority is a public benefit corporation created by State law at the request of Oneida and Herkimer Counties to develop infrastructure critical to the long-term health and well being of the local environment. The Authority has made substantial investments on behalf of all residents, businesses and industries of Oneida and Herkimer Counties. This investment has included the regional recycling center, two regional transfer stations, a facility to manage hazardous waste (i.e. paints, pesticides, chemicals), green waste composting, waste audits, industrial residual waste testing and management, and public information.

The Authority receives no funds from the Counties. All the revenues to pay for these facilities and provide for these services come from the fee for disposal of non-recyclable waste.

The development of this system was done on the basis of receiving all the waste and recyclables generated within the two Counties. When waste is taken out of the Authority system it also diverts the revenue needed to operate Authority facilities and services.

From the Nation's perspective, there are some direct benefits to utilizing the Authority system:

1. **Recycling** - The Authority offers the opportunity to recycle more items than any other facility. This can help reduce your costs and help preserve the environment in the long run. We charge $0 for recyclables. If the Nation pays for waste disposal by the ton or cubic yard, recycling can directly reduce your expenses. Also, if the Nation wishes to

directly market high quality items (i.e. office paper) that is no problem. We've done "audits" for over 300 area businesses to identify waste reduction and recycling opportunities, that can improve efficiency and save money.

2. **Environmental Indemnification** - We offer an unlimited indemnification reflecting our highest level commitment to use the best environmental protection systems at our own facilities and those we contract with. Without this indemnification, waste generators are at risk for an enforcement action that may force payment for a cleanup that does not reflect the type or character of waste that generator contributed. Locally, over 600 small businesses, school districts and other generators of regular non-hazardous solid waste were forced to pay for the clean-up of the Ludlow Landfill even though they contributed none of the PCB oils that were the source of the pollution.

3. **Hazardous Waste Management** - The Authority handles problematic wastes such as paints, oil, batteries, light fixtures, pesticides, and other chemicals. The Nation has utilized these services.

4. **Convenience** - Authority facilities are located nearby, (the Western Transfer Station is only 12 miles away on NYS Route 365) thereby minimizing down time for servicing compactor boxes and other waste containers.

5. **Special Services** - We can provide large capacity (100 cubic yd.) walking floor trailers to be live loaded at a demolition job site at a very competitive price of $69 per ton for transportation and disposal.

These benefits can be achieved by the Nation either by a contract with the Authority or by arranging to have your hauler utilize the Authority facilities. If the Nation were to sign a contract with the Authority you would also receive the benefit of being guaranteed the lowest rates in our system and you'd have access to favorable credit terms.

Obviously we are hopeful the Nation will agree to redirect your waste back to the Authority system.

If you are not interested in a contract with the Authority or in redirecting your hauler, I would like an opportunity to offer a collection proposal that may be advantageous to the Nation.

In the final analysis, I hope we can work together to support the commitment made to our region's environmental infrastructure. Thank you for your consideration and I'll call you soon to see if we can discuss these possibilities.

Sincerely,

/S/

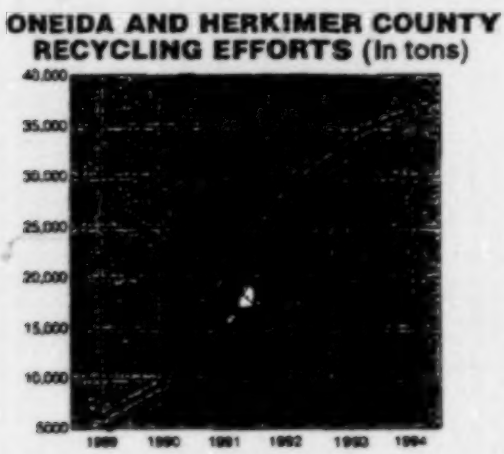
Hans G. Arnold
Executive Director

HGA/aag

ONEIDA - HERKIMER SOLID WASTE AUTHORITY
311 Turner Street Suite 401
Utica, New York 13501
(315) 733-1224

Dear residents and businesses of Oneida and Herkimer Counties,

We would like to share with you some important news about our local solid waste management system. First of all, with the addition of the three new recyclable items announced in the accompanying poster, we can now accept most of your paper products and containers, plus six types of plastic. In addition, household hazardous materials, paint, used motor oil, batteries and tires, yard waste, major appliances, plus construction and demolition debris are accepted at your Recycling Center. To date, we have removed over 133,000 TONS of recyclable material from our waste stream, material which has been processed by private industry and made into new products. Obviously, none of this would be possible if you were not enthusiastic participants.



Secondly, you may have recently heard about a lawsuit filed by the following group of waste haulers: Transfer Systems, Inc., Bliss Enterprises, Inc., Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial Containers, Inc. and Ingersoll Pickup, Inc. Filed against the Oneida-Herkimer Solid Waste Authority, Oneida County and Herkimer County, this action seeks to have a Federal Court overturn our local solid waste management laws. These local laws were the first step in building what has become one of the most successful recycling programs, not only in NY State, but in the entire nation.

Here's how your system works. The fees that haulers pay our local system, and in turn pass on to you for their services, not only cover the cost of landfilling your garbage—a fee competitive with those charged in other areas—but also include the cost of processing your recyclables, plus many other services.

If haulers stop delivering your garbage to our local waste management system, we will no longer receive the funds to support all these services. It's easy to see why everyone needs to participate to make the system work.



YOU

- SEPARATE & SET OUT RECYCLABLES
- SET OUT GARBAGE
- PAY HAULER AND/OR MUNICIPALITY FOR PICKUP



PRIVATE & PUBLIC HAULERS

- PICK UP GARBAGE & RECYCLABLES
- PAY AUTHORITY $86 PER TON

Recycling Center



ONEIDA-HERKIMER SOLID WASTE AUTHORITY

- DISPOSES OF GARBAGE IN LANDFILL
- PROCESSES RECYCLABLES
- GREEN WASTE COMPOSTING
- HOUSEHOLD HAZARDOUS WASTE
- WASTE OIL RECYCLING
- TIRE RECYCLING
- INDUSTRY WASTE AUDITS
- PUBLIC EDUCATION
- ADMINISTRATION

In addition to making recycling a top priority, our local system was also created to ensure the safe management of our solid waste. The individual resident is responsible for his or her garbage not only when they set it out, but also when it is disposed of at a landfill. This is why we were so careful in selecting (through a competitive bid process) the Empire Sanitary Landfill in Pennsylvania to serve the area until a local landfill can be built. The Empire Landfill employs every modern environmental system necessary to protect ground water, people near the landfill, and the environment in general. If waste goes to a landfill which does not employ these protections, there can be serious legal and financial implications if there is an environmental problem in the future. (You may remember that over 600 residents, plus businesses, school districts, villages, towns and cities in Oneida and Herkimer Counties were sued to pay for the clean-up of the privately owned Ludlow Landfill.)

We congratulate community residents, businesses and industries for doing their part to make our system work. We look forward to finding new markets so that we can recycle even more. If you have any questions, please call us.

Sincerely,

/S/
Hans G. Arnold
Executive Director

BOARD OF DIRECTORS
Charles P. Patterson, Chairman
James M. D'Onofrio, Vice Chairman
Harry A. Hertline, Treasurer
Gerald C. Brodock
R. W. Burrows, Jr.
Louis R. Critelli
Barbara Freeman
David H. Link
Robert McLaughlin

File Copy - Property Of:
Oneida-Herkimer Solid Waste Authority
1600 Genesee Street
Utica, NY 13502

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY

DRAFT ENVIRONMENTAL IMPACT STATEMENT IMPACT STATEMENT FOR SITE WLE-5 EAST, A PROPOSED SANITARY LANDFILL IN THE TOWN OF AVA, NEW YORK

January, 1998

* * *

In addition to the findings presented in the Market Profile study, there are a number of other non-cost related reasons for favoring development of the proposed landfill rather than pursuing waste exportation:

- To ensure that environmentally and economically sound long-term landfill disposal capacity will be available to the Oneida-Herkimer region.
- Prior disposal practices at out-of-region disposal facilities and the types of wastes disposed from other sources would expose the Authority (and local waste generators) to environmental clean up costs and risks.
- Many of the potential disposal facilities could only take a portion of the region's waste, and for a varying number of years (due to different permit durations). This would require the Authority to deal on a long-term basis with the management, legal, cost and liability issues stemming from the use of multiple disposal facilities.
- Long-term reliance on waste exportation would mean that most of the dollars collected in tipping fees (approximately $10 million per year) will leave the local economy, thus losing the economic benefits that would be associated with a new local landfill.
- For the foreseeable future, even with the very aggressive recycling programs underway, a significant portion of the region's waste stream will require landfilling.
- When preparing proposals for potential waste exporters, many contact landfills will make the

proposal contingent upon the development of new disposal capacity at their facility that is not yet permitted. This is due to the relatively short term for which landfill permits are typically issued (e.g., five to ten years). A long-term disposal contract with such a facility could be terminated earlier than anticipated if, for some reason, the facility's permit was not reissued. If the Authority operated its own landfill, it would have greater control over the factors and conditions upon which landfill permits are issued.

Draft EIS for Proposed Landfill Site WLE-5 East
Oneida-Herkimer Solid Waste Management Authority
-xv-

* * *

DEPARTMENT OF SOLID WASTE MANAGEMENT
County Office Building
800 Park Avenue
Utica, New York 13501
Tel: (315) 798-4042; Fax (315) 798-5474

Oneida County
John D. Plumley
County Executive

Hans G. Arnold
Commissioner

Memorandum

To: John D. Plumley, Oneida County Executive
Robert F. Julian, Chairman Environmental Conservation Committee
Majority Leader Board of Legislators

From: Hans G. Arnold, Commissioner of Solid Waste Management

Date: January 4, 1989

Re: Long-Term Financial Analysis

As you know, I put together the attached primarily as a method of how future solid waste costs (recycling, waste-to-energy, landfill) will be paid for. A specific objective was to alleviate the County tax burden and get the costs onto a somewhat independent user fee.

The key is, in large part, the early operation of the transfer stations as both centers of waste collection and the places where a single fee can be collected to cover the full range of solid waste costs. I believe this is essential to keep the "up-front" costs of the project off the real property taxes.

A number of issues are raised.

- Can the first year MRF operating budget be amortized with the bond issue as start-up expenses?

- Will the $23 million 1990 Authority revenue bond issue, which is in part to "payback" the County for up front costs, be supportable by flow control and the ability to set a transfer station tipping fee? I believe it will.
- The large bond issues may in fact be staged thus lowering the early year spikes in tip fees.

I have also discussed this with Comptroller Ford and Finance Commissioner Fahy. The numbers on the attached are preliminary. Our consultant engineers and project counsel are in the process of reviewing this. Once that is complete, it will be important to review this with the Authority. Given the magnitude of the financing and the difficult policy decisions which will be forced, I believe that we should consult with a financial advisor and possibly an underwriter at the earliest possible date.

PRELIMINARY ONLY

NOT PUBLIC DOCUMENT

REVENUES

	AUTHORITY	COUNTY
1988		1. GF Payment Against GO Borrowing 2. Tip Fees for ERF & ALF 3. GF Payment for DSWM
1989		1. GF Payment Against GO Borrowing 2. GF Payment for DSWM
1990	Also potential for Revenue Bond issues to "Buy Out" outstanding debt of ERF and ALF.	1. GF Payment Against MRF Operation 2. GF Payments for DSWM
1991		

OBLIGATIONS

	AUTHORITY	COUNTY
1988		$722,000 G.O. * • GIS & Port • Design • Urban Fuel Study $3,000,000 G.O. • ALF Const. • ERF Equip. $3 845 Unit • ERF & ALF Operating Budget $187,603 G.O. • DSWM Administrative Budget
1989	$4,500,301 • ERF & ALF Operating Budget	$1,831,851 G.O. * • Landfill Hydrology • Landfill EIS • Landfill Design • Air Monitoring & Modeling • Health Risk • ERF RFP • Public Info $4,625,400 G.O. * • Landfill Acquisition • MRF Const. & E • Compost • C & D • Transfer Station Design $356,192 • DSWM Administrative Budget
1990	$3,000,000 • ERF & ALF Operating Budget $23,000,000 Revenue Bond Issue • Transfer Station Construction • EIS, Permitting Environmental • Hickory County *	$2,500,000 • MRF Operating Budget $560,000 • DSWM Administrative Budget
1991		$2,800,000 • MRF Operating Budget $3,920,000 • ERF & ALF Operating Budget $556,000 • DSWM Administrative Budget $18,750,000 Revenue Bond Issue • Permits, Contracts, Environmental • Landfill Construction • Waste To Energy Construction

1. Tip Fees for ERF & ALF
2. Repayment to County by Authority

1. Single Transfer Station Tip Fee to include:
   - ERF & ALF Operations
   - MRF Operations
   - Private Landfill Tip Fee
   - DSWM Administration
   - Revenue Bond Payment

BEST AVAILABLE COPY

JOHN D. PLUMLEY
Oneida County Executive
County Office Building
800 Park Avenue, Utica, NY 13501
Phone: (315) 798-5800

November 7, 1988

Re: Contractual Relationship Between the Counties and the Oneida- Herkimer Solid Waste Management Authority.

GENERAL

The Counties and Authority should make a mutual good faith pledge to develop the most environmentally sound and most economical system of facilities that are fair and equitable to all parties.

The Authority should provide the Counties – the County Executive, Chairman of the Board, appropriate legislative committees and County Administrator – with full and regular status reports regarding planning activities, construction schedules, bid schedules and results, facility performance, financing, projected budgets, projected fees and other related information and activities of the Authority. At the start, I believe this reporting should be done monthly. Once facilities are fully operational, quarterly reports may be adequate. In any case, the requirements for such reporting should be considered for inclusion in the contract.

While such reporting and close coordination is essential, the prior approval by the Counties of these items should not be required or in the contract. Prior counties approval would defeat the benefit of creating a more efficient means for administering and implementing the project. The Authority is the official means for joining the two counties and it creates a Board to make decisions and take action. More importantly, such requirement for prior approvals could be a real impediment to the Authority's financing capability. The

Authority law specifically states that the Authority bonds shall not be the debt of the County. Prospective bond purchasers could balk at an arrangement where such duplication of approvals were contractually required.

WASTE COMMITMENT/ FLOW CONTROL

The Authority Law empowers the Authority to develop the necessary solid waste management facilities. The ability to finance and then operate these facilities depends upon the legal commitment of the waste. This essential responsibility rests with the Counties and its exercise ultimately controls the project.

The contract should include an agreement by the Counties to direct solid waste, recyclables, and all waste material under its jurisdiction pursuant to the flow control provision of the law to the facilities of the Authority.

Since these facilities will not come on line simultaneously, the contract should provide far the counties' waste commitment on a segmented basis. The counties can agree to enact or amend laws, ordinances or regulations to accomplish this purpose.

The Authority should be obligated to provide facilities at the earliest feasible dates, which should follow the schedule developed in the ongoing work by the Department of Solid Waste Management and the counties' consultants.

SITES

To insure that the critical work started by the Counties is carried forward in the manner now underway, the Authority should be required to use and follow the site evaluation and selection procedure approved by the counties. Any modifications to this procedure would require formal prior approval by both Counties. The contract should not restrict or amend the powers of the Authority to identify sites, enter the sites for detailed study, acquire the sites, and develop the facilities.

PERMITS

The contract should require the Authority or its contractee to obtain and fully maintain all required State and Federal permits. The Authority should be contractually required to comply with County requirements such as the "state-of-the-art" resolution. Documentation of this should be given to the Counties.

The Authority should be required to report on a regular basis to the counties regarding compliance with all permits, conditions, and approvals for all facilities and programs.

The Authority should assume lead agency status and all State Environmental Quality Review Act responsibilities from the Counties.

EXISTING FACILITIES

The contract should provide for the Authority to assume responsibility for the operation and ownership, if possible, of the existing County solid waste management facilities: the Oneida County Energy Recovery Facility (ERF) and the Ash Landfill. This responsibility should include the day-to-day operation of receiving and processing waste, production of energy, operation of all equipment and vehicles, and related activities. It should also include the responsibility to meet the outstanding debt, and the obligations for principal and interest payments.

It is essential that solid waste be managed by a single entity. This will make solid waste management more efficient and effective. Oneida County's initiative has created a relatively secure and inexpensive means of disposal for part of the waste stream for part of the County. However, in the future even the existing facilities will need major renovation to continue operation. The Ash Landfill has five years of capacity and expansion at Tannery Road will not be allowed by State. The ERF depends on an approved landfill for ash disposal. Therefore, its long term viability is directly

dependent on the success of ongoing efforts to site and develop new landfill. Major air pollution control improvements and other retrofits are being mandated for the ERF by the State. These existing facilities must be an integrated part of plans for new facilities and one entity, the Authority, should be responsible for the development and coordination of such plans. There are existing waste supply contracts, energy contracts, operating permits, and outstanding bonds all of which must be addressed to insure that no contractual conflicts are created.

The contract provision for dealing with existing facilities may need to be phased. The first phase may be an arrangement whereby the Authority would assume operations and financial obligations on behalf of the County. For example, part of the disposal fees would be paid to the County to meet the principal and interest obligations. If it is legally allowable under the standing bond issues, the contract should provide for the transfer of the outstanding debt on the ERF and Ash Landfill. Obviously, title to the associated properties should also be transferred.

EXISTING EMPLOYEES & SERVICES

The Authority Law provides for the Authority to retain all necessary employees and for the transfer of existing employees at the approval of the Counties. This transfer should occur as soon as the Board of Directors is fully functioning. I would anticipate this to be in early 1989. The Counties will still have some responsibility for staff and consultants by providing funds for salary and support until the Authority facilities can support the staff through its fee structure. The existing operating staff for the ERF and Ash Landfill are currently fully paid by the disposal fees and this can continue with the Authority assuming full responsibility.

Coordination and provision of certain services are provided to the Department of Solid Waste Management by other Departments such as Audit and Control, Planning, Personnel,

Finance, Compensation, Law, Purchasing, Central Services, and Public Works. Until a review can be completed jointly between the Authority and the Counties, these interdepartmental service arrangements should continue to function as they do currently.

BOARD OF DIRECTORS

This Board will be required to devote an extensive amount of time and effort to the function of the Authority. They will be siting, financing and building several multi-million dollar facilities. They will be called on to exercise prudent judgement after careful study of the issues and recommendations. I expect it will require at least 25-30 meetings annually. I would recommend that the members receive an appropriate per diem for all regular and special meetings in addition to reimbursement for expenses. The Authority chairman should be compensated at an appropriate rate commensurate with his responsibility per meeting plus expenses. Great care has gone into the development of the Authority and the appointment of its members. It will be, in essence, a corporate board of directors with a very high level of responsibility.

The Cost of Flow Control

Prepared by:
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Prepared for:
Browning-Ferris Industries
NERA Consulting Economists

May 3, 1995

The Cost of Flow Control

I. INTRODUCTION AND SUMMARY

Congress is currently considering legislation to enable local governments to designate the destination of municipal solid waste generated within their jurisdictions—often referred to as flow control—in response to a recent U.S. Supreme Court decision, *C.A. Carbone, Inc. v Town of Clarkstown, New York* which effectively prevents local governments from imposing such controls. Browning Ferris Industries (BFI) and many other members of the solid waste industry, as well as some local government officials, are concerned that while flow controls may have been justified in some circumstances, unrestricted application of such controls in the future will discourage competition and impose substantial costs on consumers. Based on this concern, BFI retained National Economic Research Associates (NERA) to estimate the costs imposed by flow control on consumers.

NERA conducted an econometric study of disposal charges (tip fees), relying on data for over 4,000 waste management facilities (landfills, incinerators and transfer stations) collected by Chartwell Publishing, to determine

whether flow controls increase disposal costs, and if so, by how much.[1] NERA found that flow controls increase disposal costs on average of $14 per ton or 40 percent. More specifically, NERA found:

- Flow control adds approximately $10 per ton or 33 percent to the average landfill disposal charge (tip fee) nationwide.
- Flow control adds approximately $11.50 per ton or 23 percent to the average incinerator disposal charge (tip fee) nationwide.
- Flow control adds approximately $14 per ton or 33 percent to the average transfer station disposal charge (tip fee) nationwide.

These results are summarized in Table 1 and Figure 1.

NERA also conducted several case studies and reviewed case studies conducted by other organizations. These studies provided further support for the conclusion that flow control increases disposal costs.

These findings are not surprising. Flow control is generally made necessary precisely because waste would otherwise be shipped elsewhere to save on disposal costs. Consequently, unless there are benefits associated with flow control which exceed the higher disposal costs, flow control cannot be justified on economic grounds. Flow control proponents have not identified benefits of this magnitude aside perhaps from protecting existing local government financial obligations associated with waste management facilities built assuming flow control. The U.S. Environmental Protection Agency's (EPA) recent report to Congress on flow control, for example, did not find controls necessary to achieve public health and environmental goals.

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[1] Chartwell publishes the Solid Waste Price Digest, the most comprehensive disposal charge record available.

The remainder of this report is organized as follows. Section II presents a brief background on the flow control debate. Section III explains the methodology and data used in the econometric analysis. Section IV presents the results of the analysis. Section V reviews the case study evidence. Appendix A provides additional detail on the results of the econometric analysis. Appendix B describes NERA's qualifications.

II. BACKGROUND

Flow control refers to local laws by which local governments direct that the municipal solid waste (including residential, commercial and industrial) generated within their jurisdictions be disposed of and/or processed at designated facilities. Local governments have been imposing such controls since at least the early 1970's, principally for two reasons—to protect sizable investments in waste facilities and to generate fee revenues to finance solid waste programs. Many local governments built and/or financed large scale waste management facilities which require substantial minimum waste flows to cover costs. Many of these facilities, for example, are resource recovery plants which operate under contracts to provide steam for industrial processes and electricity generation. Some of these plants would not be economic without these contracts, and the contracts require that they provide a specific amount of steam requiring a specific amount of waste. Consequently, local governments need to direct waste to these plants to protect their investments. In fact, according to the *Resource Recovery Yearbook* about 48% of the resource recovery plants constructed since 1964 benefit from flow controls.[2] More recently, local governments have financed and built transfer stations and material recovery facilities. These facilities, especially the latter, also require substantial waste flows to be economic. Public landfills have been less reliant

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[2] Another 47 guarantee sufficient waste flow via contracts.

on flow controls, although economies of scale may encourage larger facilities. Some local governments also have turned to flow control to generate fee revenues often used to finance waste management programs such as recycling and household hazardous waste. Without flow control, waste generators could avoid such fees by turning to alternative disposal options in other jurisdictions.

AVERAGE TIP FEE WITH AND WITHOUT FLOW CONTROL

Across All Types of Facilities

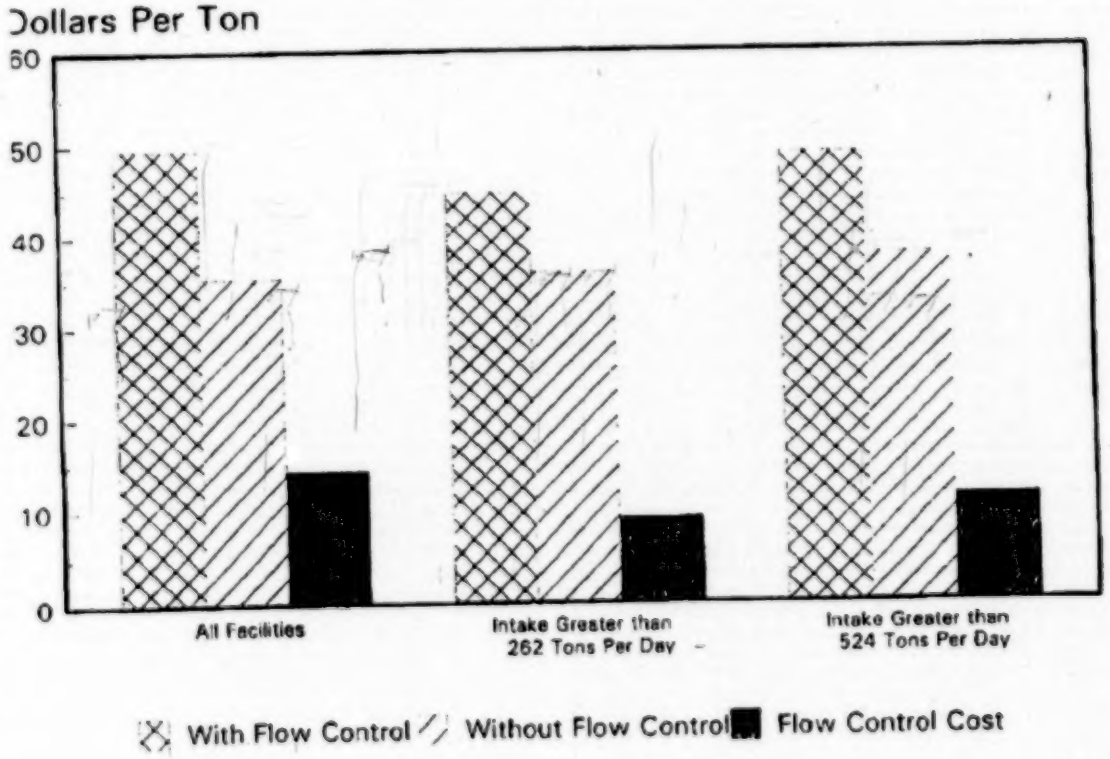


FIGURE 1

TABLE 1

AVERAGE TIP FEE WITH AND WITHOUT FLOW CONTROL

Across All Types of Facilities (Landfills, Incinerators, Transfer Stations)
($/ton)

	All Facilities	Facilities With Intakes Greater Than 262 Tons Per Day	Facilities With Intakes Greater Than 524 Tons Per Day
(1) Average Tip Fee With Flow Control	$49.49	$44.71	$48.92
(2) Average Tip Fee Without Flow Control	$35.31	$35.85	$37.76
(3) Flow Control Cost	$14.18	$8.86	$11.16
(4) Percent Increase in the Average Tip Fee With Flow Control Due to Flow Control [Row (3) ÷ Row (2)]	40.16%	24.71%	29.57%

Notes and Sources

These values are based on a regression analysis of tip fees using data from Chartwell Information Publishers. Browning-Ferris Industries identified which facilities are subject to flow control. Population density data is from the U.S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States: 1993*, (113th edition.) Washington, DC, 1993, Table No. 31. The values presented are mean values determined by the following equation: tip fee= f(mean state population density, existence of flow controls). The mean population density for all facilities is 193.025 persons per square mile. For facilities whose intake is greater than 262 tons per day, it is 201.681 persons per square mile. For facilities whose intake is greater than 524 tons per day, it is 235.868 persons per square mile.

Observations are further restricted to facilities which have tip fees greater than 0 and remaining capacity greater than 1 year.

Although flow controls have been imposed for over 20 years, they have only recently become a serious concern as the variety and accessability of alternatives has increased. The private sector responded to rapidly rising disposal costs in the mid-1980s to the early 1990s by building more disposal capacity. While the number of landfills in the U.S. has dropped rather dramatically, landfill capacity has not. In fact, capacity has been increasing in many regions of the country.[3] As a result, disposal charges are no longer increasing, but rather falling as disposal facilities compete for business. In addition, the disparity has been exacerbated by local governments relying on flow control to finance recycling and other waste management programs. Local governments have imposed fees and surcharges at flow control facilities. Third, some governments became more aggressive regarding flow control as waste streams diminished at least in part because of government regulations and programs. Paper recycling, for example, has eliminated an important fuel stock from resource recovery plants.

The costs imposed by flow control have led to a series of lawsuits primarily by private haulers against local governments. The U.S. Supreme Court has heard several of these cases, finding in each instance that flow controls violated the Constitution's commerce clause. The Court's most recent decision, *C & A Carbone, Inc. v. Town of Clarkstown, New York (No. 114 S. Ct. 1677 (1994))*, has prompted flow control proponents to petition Congress for relief. Proponents contend that flow control is necessary to protect the financial obligations that many local governments have made. Proponents also contend that because local governments must by law provide solid waste services, they must also be empowered to control the flow of waste.

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[3] See, for example, U.S. EPA, "Flow Controls and Municipal Solid Waste," Report to Congress, March 1995, EPA530-R-95-008.

Following this argument, each local jurisdiction must be responsible for the waste generated within its borders.

While opponents have emphasized the cost of flow control, there has been surprisingly little analysis done to demonstrate this. The available evidence is largely anecdotal—case studies showing the availability of low cost alternatives to waste generators currently restricted by flow control. Although these case studies are useful, there has been no broad-based study to establish the magnitude of the costs imposed by flow control. BFI retained NERA to address this gap.

III. ECONOMETRIC METHOD USED TO ESTIMATE THE COST OF FLOW CONTROL

A. Method

We relied upon a statistical technique referred to as multiple regression analysis to measure the impact of flow control on tipping fees.[4] This technique enables us to isolate the impact of flow control from other factors which influence tipping fees. The multiple regression analysis was performed in three steps. First, the relevant variables were identified and the relationship expected between the dependent and independent variables was determined.[5] Second, data on the variables were obtained. In this case, data on tipping fees by technology, facility ownership, facility site and population were obtained. Third, the specific relationships among the variables were examined through the use of multiple regression analysis.

The regression technique is best demonstrated by an examination of how it is used to estimate the relationship between a single independent variable and a dependent variable. For example, regression analysis may be used to estimate the relationship between landfill tipping fees and population density. As a first step, the analyst determines how he or she expects the variables to relate. This would lead to specifying a regression equation which could be written as:

$$\text{Tipping Fee} = b_0 + b_1 \times \text{population density} \quad \text{(eq. 1)}$$

The symbols b_0 and b_1 are called "coefficients." The b_0 coefficient (also known as the "intercept term") represents

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[4] For a detailed explanation of regression analysis, see, for example, R. Pindyck and D. Rubenfeld, Economic Models and Economic Forecasts, Third Edition, McGraw Hill, 1986.

[5] For expositional convenience, the variable for which one is interested in making an estimate in regression is referred to as the dependent variable and the determinants of the dependent variable as the independent variables.

attendance with no population (although, in fact, of course, there is always population). The b_1 coefficient represents the value of the effect on tipping fee of an increase in population density of one unit (one more person per square mile in this example).

The second step is to obtain data for a sample of tipping fees and population densities. Figure B-1 is a graph of the observations for a hypothetical sample of such data. The vertical axis in this graph describes tipping fee, the horizontal axis describes population density and each of the data points (the triangles) in the graph indicates a single observation of tipping fee and population density. From this scatter diagram it is evident that, while there is considerable dispersion to the points, there is generally a direct relationship between tipping fee and population density-the greater the population density, the greater the tipping fee.

The third step is to establish a more precise relationship between population density and tipping fee. Through regression analysis, a line can be estimated which describes the average relationship between tipping fee and population density—a line that best "fits" the pattern of data points. Such a regression line has been plotted in Figure 2. The "best fit" line can then be described in equation form. For example, the data in Figure show that the line of best fit is as follows:

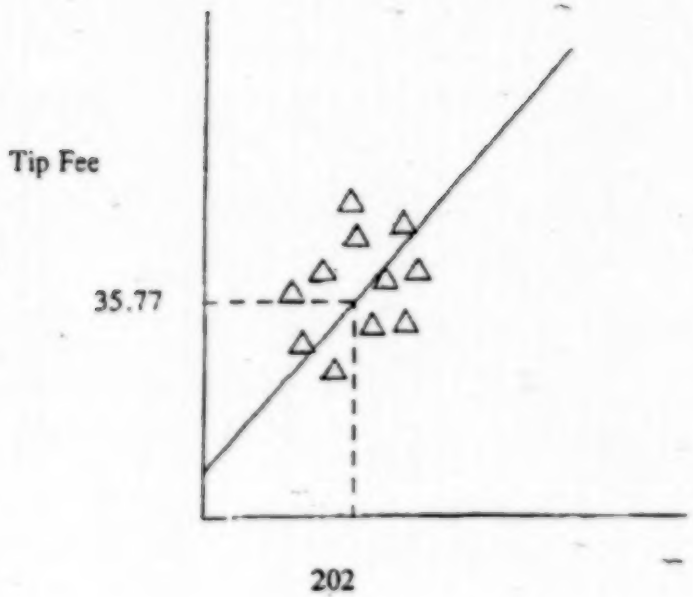
$$\text{Tipping Fee} = 25.67 + 0.05 \times \text{Density} \qquad \text{(eq.2)}$$

The 25.67 corresponds to the b_0 coefficient and represents the expected tipping fee from the hypotheticai sample transactions without accounting for the effect of density. The 0.05 corresponds to the b_1 coefficient and indicates that for every additional unit of density, tipping fee increases by 0.05 dollars per ton. For example, the equation predicts that with a population density of 202, tipping fees would be $35.77.

FIGURE 2

The Relationship Of Tip Fee And Density

Tip Fee = 25.67 + .05 * Density



Using the regression coefficients, one can estimate the value of the dependent variable for any actual or hypothetical combination of independent variables. To make such an estimate, one multiplies the values of the independent variables by the respective regression coefficients, sums the result and adds the regression coefficient representing the intercept (b_0). For this study, we examined the impact of flow control on tipping fee by specifying the following equation:

$$A_t = b_0 + b_1X_1 + b_2x_2 + b_n+_1X_n+_1 +E \quad \text{(eq.3)}$$

Where A_t represents the tipping fee by disposal technology (landfill, incinerators and transfer station), the b's represent the regression coefficients to be estimated and the x's represent various characteristics or factors we expect to affect tipping fees. E represents the unexplained error. These characteristics include population density, facility ownership (public or private), facility operator (public or private), daily capacity, location (state, census region, etc.), and the presence of flow control. Population density serves as a proxy for several factors which are likely to have a positive impact on tipping fees. High density will reflect higher demand for disposal and higher land costs. Fees may also vary by facility ownership. Public facilities may be lower cost because of lower cost financing or subsidized rates. Public or private management may also affect fees, although the direction of the impact is unclear. Location may also affect fees, reflecting differences in regulation or local fees and taxes. Finally, based on the preponderance of anecdotal evidence reviewed and the perceived need for flow control to keep waste local, we expect flow control to have a positive effect on tipping fees.

B. Data

We relied on tipping fee data collected by Chartwell Publishing for publication in the *Solid Waste Price Digest.* Chartwell surveys disposal facilities on a regular basis-as frequently as monthly for large facilities. This data identifies over 4,000 facilities by name, location, facility type (landfill, incinerator and transfer station), ownership, operator (public or private) and tipping fee. We relied on fees updated during the first quarter of 1995. Chartwell did not identify which facilities operated under flow control. We collected this information with the assistance of BFI regional managers. We confirmed the presence of flow control at incinerators by reference to the *Resource Recovery Yearbook, 1993 Edition.* The share of incinerators reported to have flow control was 48 percent compared to the Yearbook's 43 percent. The presence of flow control at landfills and transfer stations was more difficult to confirm. The share of landfills and transfer stations with flow control, however, appear reasonably consistent with the shares reported by U.S. EPA in its report to Congress on flow control. EPA reported that landfills did not frequently rely on flow control. Our data showed that about 13.5 percent of landfills had flow control. EPA reported that about 19 percent of materials handled by MRFs were subject to flow control. Our data indicated that about 29 percent of the transfer facilities (many of which presumably are MRFs) were subject to flow control.

The *Resource Recovery Yearbook* also provided us with an alternative data set for incinerator tipping fees. These data were used to confirm the results based on the Chartwell price and BFI supplied flow control information.

IV. RESULTS

The regression analysis conducted on the data described above demonstrated that flow control has a statistically significant positive impact on tipping fees. This finding holds regardless of density, ownership, operator, size

and technology. On average, flow control adds $14 per ton to tipping fees or a 40 percent increase. Note that this does not mean that flow control always results in higher fees, but that on average, one would expect higher fees if flow control were imposed.

Table 2 and Figure 3 summarize the results for landfills. Regressions were run accounting for landfill daily capacity or intake. As shown, flow control adds about $10 per ton across all landfill sizes, and between $4 and $6 if we restrict the analysis to larger landfills.

Table 3 and Figure 4 summarize the results for incinerators. Regressions were run accounting for incinerator daily capacity. As shown, flow control adds about $11.50 per ton to tipping fees across all incinerator sizes and between $7.40 and $13.25 for large facilities.

Table 4 and Figure 5 summarize the results for transfer stations. Regressions were run accounting for transfer station daily capacity. As shown, flow control adds about $14 per ton to transfer stations across all sizes and between $12.17 and $16.38 if we restrict the analysis to larger transfer stations.

TABLE 2

AVERAGE LANDFILL TIP FEE

With and Without Flow Control

($/ton)

	All Facilities	Facilities With Intakes Greater Than 262 Tons Per Day	Facilities With Intakes Greater Than 524 Tons Per Day
(1) Average Tip Fee With Flow Control	$40.34	$35.37	$39.09
(2) Average Tip Fee Without Flow Control	$30.38	$31.11	$32.98
(3) Flow Control Cost	$9.96	$4.26	$6.11
(4) Percent Increase in the Average Tip Fee With Flow Control Due to Flow Control [Row (3) ÷ Row (2)]	32.78%	13.70%	18.52%

Notes and Sources

These values are based on a regression analysis of tip fees using data from Chartwell Information Publishers. Browning-Ferris Industries identified which facilities are subject to flow control. Population density data is from the U.S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States: 1993*, (113th edition.) Washington, DC, 1993, Table No. 31. The values presented are mean values determined by the following equation: tip fee= f(mean state population density, existence of flow controls). The mean population density for all facilities is 145.382 persons per square mile. For facilities whose intake is greater than 262 tons per day, it is 159.454 persons per square mile. For facilities whose intake is greater than 524 tons per day, it is 181.002 persons per square mile.

Observations are further restricted to facilities which have tip fees greater than 0 and remaining capacity greater than 1 year.

AVERAGE LANDFILL TIP FEE

With and Without Flow Control

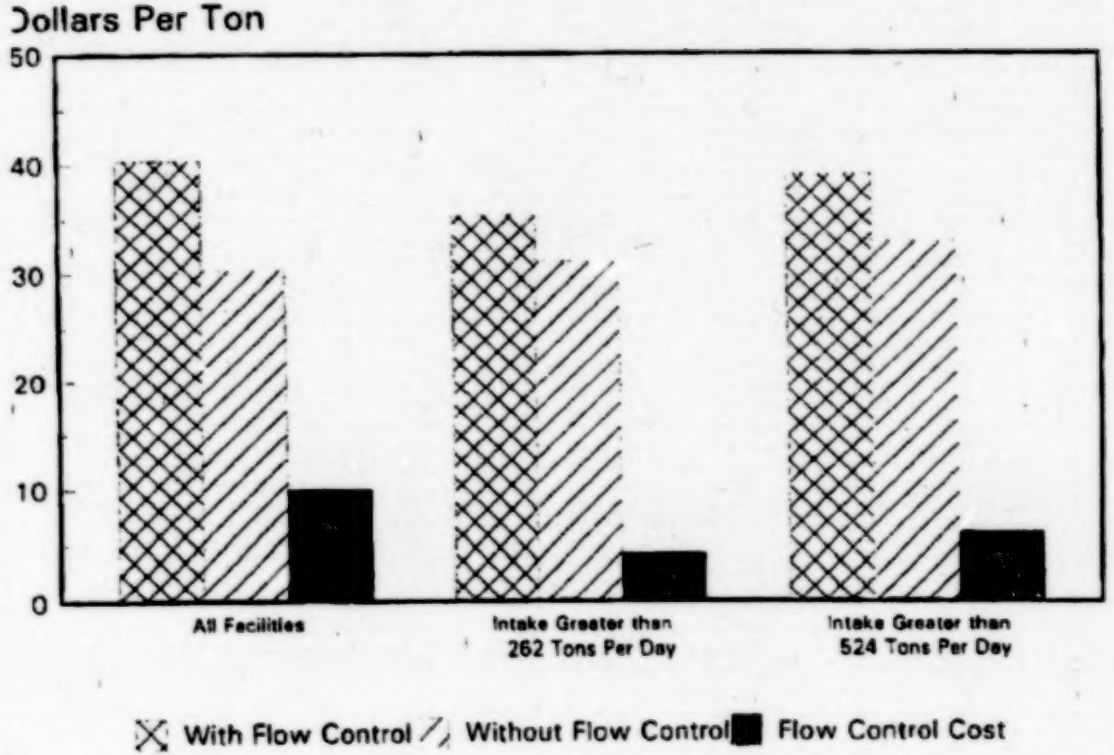


FIGURE 3

TABLE 3

AVERAGE INCINERATOR TIP FEE

With and Without Flow Control

($/ton)

	All Facilities	Facilities With Intakes Greater Than 262 Tons Per Day	Facilities With Intakes Greater Than 524 Tons Per Day
(1) Average Tip Fee With Flow Control	$60.63	$62.30	$61.46
(2) Average Tip Fee Without Flow Control	$49.16	$45.92	$48.99
(3) Flow Control Cost	$11.46	$16.38	$12.47
(4) Percent Increase in the Average Tip Fee With Flow Control Due to Flow Control [Row (3) ÷ Row (2)]	23.32%	35.66%	25.45%

Notes and Sources:

These values are based on a regression analysis of tip fees using data from Chartwell Information Publishers. Browning-Ferris Industries identified which facilities are subject to flow control. Population density data is from the U.S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States: 1993*, (113th edition.) Washington, DC, 1993, Table No. 31. The values presented are mean values determined by the following equation: tip fee= f(mean state population density, existence of flow controls). The mean population density for all facilities is 237.335 persons per square mile. For facilities whose intake is greater than 262 tons per day, it is 312.284 persons per square mile. For facilities whose intake is greater than 524 tons per day, it is 342.692 persons per square mile.

Observations are further restricted to facilities which have tip fees greater than 0 and remaining capacity greater than 1 year.

AVERAGE INCINERATOR TIP FEE

With and Without Flow Control

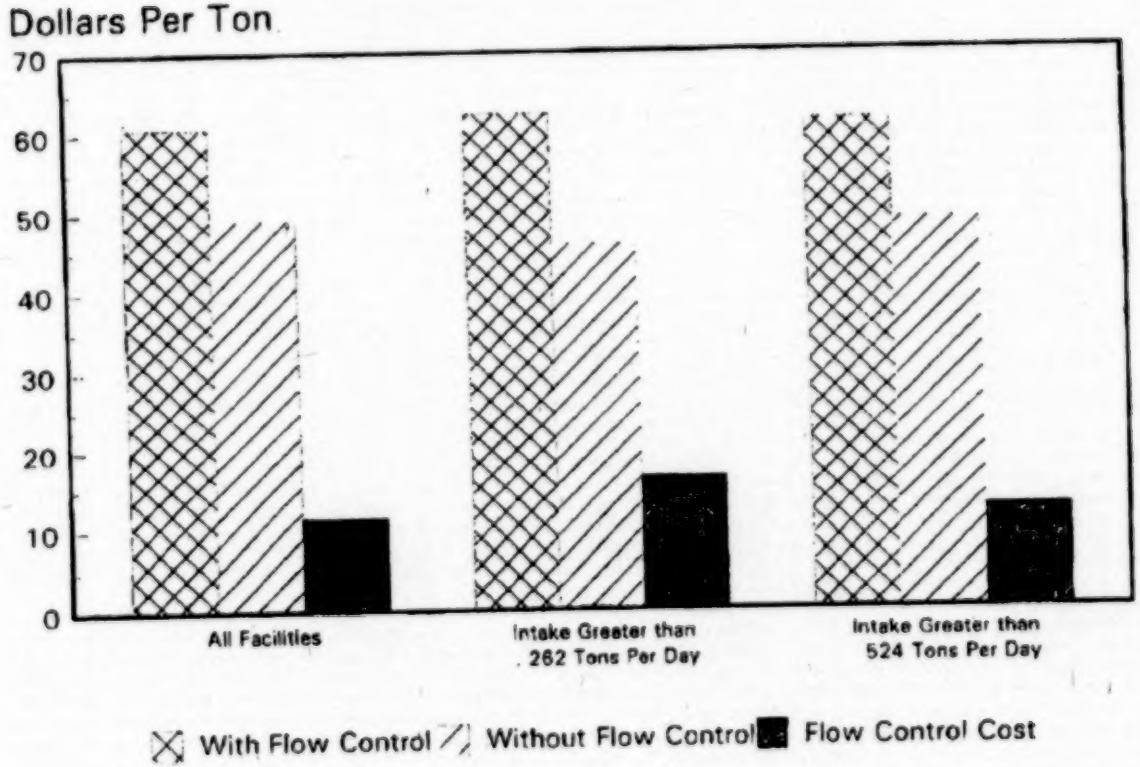


FIGURE 4

TABLE 4

AVERAGE TRANSFER STATION TIP FEE

With and Without Flow Control
($/ton)

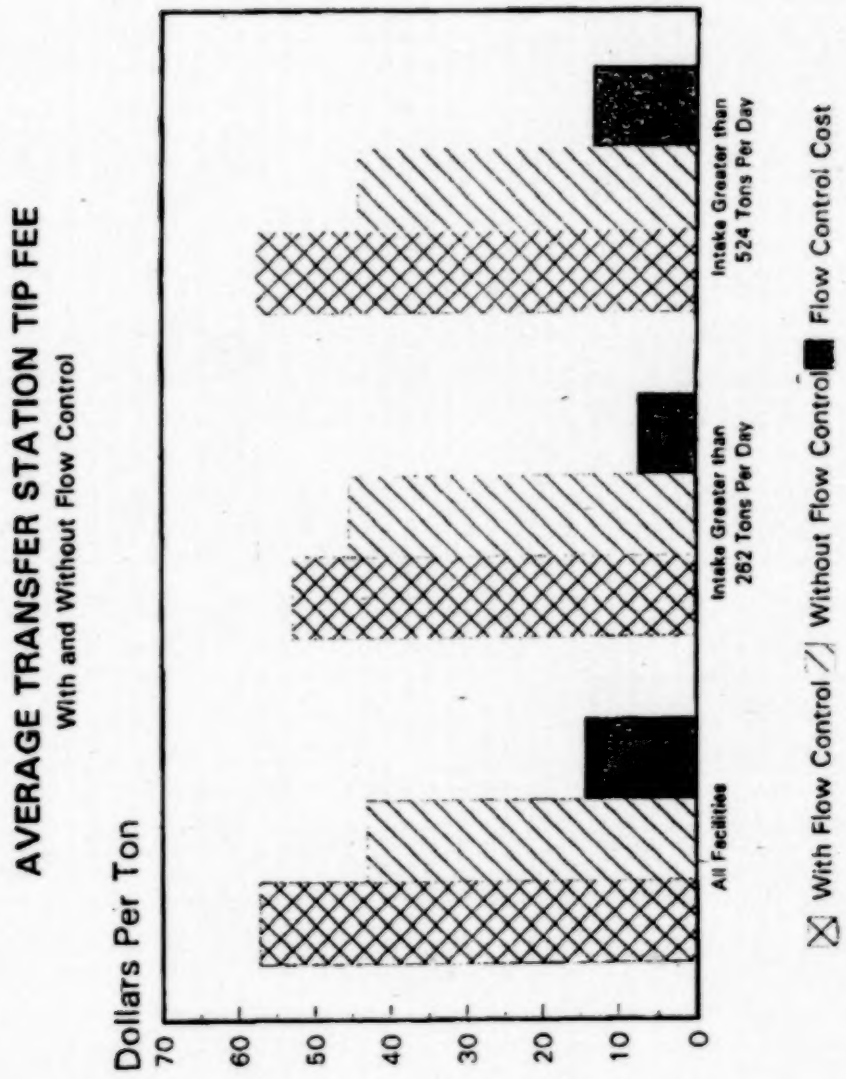
	All Facilities	Facilities With Intakes Greater Than 262 Tons Per Day	Facilities With Intakes Greater Than 524 Tons Per Day
(1) Average Tip Fee With Flow Control	$57.20	$52.89	$57.67
(2) Average Tip Fee Without Flow Control	$43.08	$45.47	$44.41
(3) Flow Control Cost	$14.12	$7.43	$13.25
(4) Percent Increase in the Average Tip Fee With Flow Control Due to Flow Control [Row (3) ÷ Row (2)]	32.78%	16.34%	29.84%

Notes and Sources

These values are based on a regression analysis of tip fees using data from Chartwell Information Publishers. Browning-Ferris Industries identified which facilities are subject to flow control. Population density data is from the U.S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States: 1993*, (113th edition.) Washington, DC, 1993, Table No. 31. The values presented are mean values determined by the following equation: tip fee= f(mean state population density, existence of flow controls). The mean population density for all facilities is 259.825 persons per square mile. For facilities whose intake is greater than 262 tons per day, it is 251.678 persons per square mile. For facilities whose intake is greater than 524 tons per day, it is 270.267 persons per square mile.

Observations are further restricted to facilities which have tip fees greater than 0 and remaining capacity greater than 1 year.

FIGURE 5


AVERAGE TRANSFER STATION TIP FEE
With and Without Flow Control
Dollars Per Ton
70
60
50
40
30
20
10
0
All Facilities
Intake Greater than 262 Tons Per Day
Intake Greater than 524 Tons Per Day
With Flow Control
Without Flow Control
Flow Control Cost

V. CASE STUDIES

In addition to the econometric analysis, we studied disposal/processing alternatives at three locations—Medina County, Ohio; Des Moines, Iowa; and Onondaga County, New York—comparing the tipping fee at flow control facilities to other nearby facilities, accounting for transportation costs. We also reviewed case studies conducted by other organizations. The additional case studies and our review confirm the results of our econometric analysis.

Two of the three case studies we conducted—in Medina and Onondaga Counties—showed that if local waste generators were free to shop for disposal sites, they could reduce tipping fees by about $20 on average. In Des Moines, however, the tipping fee at the flow control facility was quite modest and in fact lower than the nearby alternatives. This is consistent with statistical results. Not all flow control facilities are more expensive. The results of these case study comparisons are presented in Tables 5, 6, and 7.

We reviewed flow control case studies conducted by other organizations including flows and data presented in various legal cases including C&A Carbone. These studies present flow control costs which equal or exceed those determined in this econometric analysis.

TABLE 5

FLOW CONTROL IN MEDINA COUNTY, OHIO PREVENTS WASTE GENERATORS FROM SAVING APPROXIMATELY $20 PER TON

Name of Disposal Facility	Type	Tip Fee ($/ton)	Cost per Ton/Mile ($)	Distance to Facility (miles)	Total Cost ($/ton) (3)+[(4)x(5)]
(1)	(2)	(3)	(4)	(5)	(6)
(1) Medina County MRF	TS	58.00	0.057	0	58.00
(2) American Landfill	LF	25.00	0.05	45	27.56
(3) Mahoning Landfill	LF	25.00	0.057	60	28.41
(4) City of East Liverpool Landfill	LF	26.01	0.057	70	29.99
(5) R.C. Miller Transfer Station	TS	28.71	0.057	35	30.70
(6) BFI/Carbon Limestone Sanitary Landfill	LF	30.00	0.057	50	32.84
(7) BFI/Lorain County Landfill	LF	34.47	0.057	20	35.61
(8) Laidlaw/Cherokee Run-Bellefontaine Landfill	LF	30.00	0.057	110	36.25
(9) Athens-Hocking (Kilbarger) Landfill	LF	30.00	0.057	120	36.82
(10) Laidlaw/Williams County Landfill	LF	31.00	0.057	140	38.95
(11) WMI/Evergreen Recycling & Disposal Landfill	LF	35.55	0.057	90	40.66
(12) Royalton Road Sanitary Landfill	LF	43.50	0.057	15	44.35
(13) Northern Ohio Waste Transfer Station	TS	46.60	0.057	15	47.45
(14) Doherty Landfill	LF	47.50	0.057	70	51.48
(15) Average of Alternate Disposal Facilities					37.01
(16) Difference [(Row (1) - Row (15)]					20.99

Sources and Notes

Row (1): Based on Browning-Ferris Industries memo regarding flow control in Medina, Ohio, dated April 19, 1995.

Rows (2) through (14): Based on data from Chartwell Information Publishers and Browning-Ferris Industries.

Column (4): Cost per mile based on Kinheim and Ketcham's rate of $1.25 for a tractor/trailer rig. It is assumed that each rig holds 22 tons. The cost per mile is $1.25/22 tons, or $0.057. *Exporting Waste: A Report on Locations, Quantities and Costs of Out-of-City/State Disposal of New York City Commercial Waste.* Kinheim & Ketcham, April 1991.

Column (5): Distance to facility based on American Map Corporation, *Pinstripe Business Control Atlas 1992.* This list includes facilities within 150 miles of Medina, OH. It does not include the following facilities since their locations were unknown: Coshocton Landfill, Inc. and WMI/Suburban South Landfill.

All facilities except the Medina County MRF are privately-owned. All facilities are subject to flow control, however, the alternate facilities listed indicated that they accepted out-of-county waste. Facilities are restricted to those whose intake is greater than 262 tons per day.

TABLE 6

FLOW CONTROL IN ONONDAGA COUNTY, NEW YORK PREVENTS WASTE GENERATORS FROM SAVING APPROXIMATELY $20 PER TON

Name of Disposal Facility	Type	Tip Fee ($/ton)	Cost per Ton/Mile ($)	Distance to Facility (miles)	Total Cost ($/ton) (3)+[(4)x(5)]
(1)	(2)	(3)	(4)	(5)	(6)
(1) Onondaga County Resource Recovery Facility	IN	93.50	0.057	0	93.50
(2) Charles Point R&R Facility Incinerator	IN	53.75	0.057	185	64.26
(3) Modern Landfill	LF	56.26	0.057	150	66.78
(4) Energy From Waste/American Ref-fuel Niagra Facility	IN	60.00	0.057	150	68.52
(5) WMI/High Acres Sanitary Landfill	LF	65.00	0.057	70	68.98
(6) American Ref-fuel WTE Incinerator	IN	69.00	0.057	210	80.93
(7) Adirondack Resource Recovery Facility Incinerator	IN	85.00	0.057	135	92.67
(8) Average of Alternate Disposal Facilities					73.69
(9) Difference [Row (3) - Row (8)]					19.81

Sources and Notes

Row (1): Based on Browning-Ferris Industries memo regarding "Flow Control in Syracuse" dated April 19, 1995.

Rows (2) through (7): Based on data from Chartwell Information Publishers and Browning-Ferris Industries.

Column (4): Cost per mile based on Kosheim and Ketcham's rate of $1.25 for a tractor/trailer rig. It is assumed that each rig holds 22 tons. The cost per mile is $1.25/22 tons, or $0.057. *Exporting Waste. A Report on Locations, Quantities and Costs of Out-of-City/State Disposal of New York City Commercial Waste*, Kosheim & Ketcham, April 1991.

Column (5): Distance to facility based on American Map Corporation, *Pinpoint Business Control Atlas 1992*.

Alternate facilities are limited to those whose intake is greater than 262 tons per day.

All facilities except Onondaga County Resource Recovery Facility are privately-owned. All facilities except Modern Landfill are subject to flow control. The list does not include CID Sanitary Landfill since its location is unknown.

TABLE 7

FLOW CONTROL IN DES MOINES, IOWA DOES NOT INCREASE DISPOSAL COSTS

	Name of Disposal Facility	Type	Tip Fee ($/ton)	Cost per Ton/Mile ($)	Distance to Facility (miles)	Total Cost ($/ton) (3)+[(4)x(5)]
	(1)	(2)	(3)	(4)	(5)	(6)
(1)	Metro Park East Landfill	LF	25.00	0.057	0	25.00
(2)	Metro Transfer Station	TS	25.00	0.057	0	25.00
(3)	Delaware County Sanitary Landfill	LF	7.50	0.057	135	15.17
(4)	North Dallas Sanitary Landfill	LF	14.00	0.057	30	15.70
(5)	Cerro Gerdo County/Landfill North Iowa	LF	16.00	0.057	110	22.25
(6)	Dickinson County Sanitary Landfill	LF	15.00	0.057	150	26.52
(7)	Tri-County Disposal Transfer Station	TS	15.00	0.057	160	27.09
(8)	Ames-Story Environmental Corp. Landfill	LF	28.71	0.057	30	30.41
(9)	Palo Alto County Sanitary Landfill	LF	28.00	0.057	120	34.82
(10)	Winnebago County Sanitary Landfill	LF	30.00	0.057	130	37.39
(11)	Cass County Sanitary Landfill	LF	50.00	0.057	70	53.98
(12)	Average of Alternate Disposal Facilities					29.26
(13)	Difference [(Rows (1)+(2)/2) - Row (12)]					(4.26)

Sources and Notes

Rows (1) and (2): Based on data from Browning-Ferris Industries memo regarding "Flow Control Study Information" dated April 19, 1995.

Rows (3) through (11): Based on data from Chartwell Information Publishers and Browning-Ferris Industries.

Column (4): Cost per mile based on Konheim and Ketcham's rate of $1.25 for a tractor/trailer rig. It is assumed that each rig holds 22 tons. The cost per mile is $1.25/22 tons, or $0.057. *Exporting Waste: A Report on Locations, Quantities and Costs of Out-of-City/State Disposal of New York City Commercial Waste*, Konheim & Ketcham, April 1991.

Column (5): Distance to facility based on American Map Corporation, *Pinstripe Business Control Atlas 1992*.

All facilities except the Metro Park East Landfill and the Metro Transfer Station are privately-owned and are not subject to flow control.

[ATTACHMENTS A & B OMITTED IN PRINTING]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

REBUTTAL REPORT OF MARK P. BERKMAN

I. Introduction

1. I previously filed an expert report in this matter.[1]

2. I have been asked to review and comment on the Expert Report of Robert N. Stavins filed in this matter on January 10, 2003.

II. Summary of Opinion

3. Based on my review of Dr. Stavins report, I believe that he has failed to support his conclusions that: 1) the local laws do not burden interstate commerce as currently implemented and will not impose such a burden when implemented as intended; 2) the objectives sought by the Counties waste management plan produce legitimate public benefits; and 3) flow control's "unique characteristics" provide greater public benefits than alternatives that have a lesser impact on interstate commerce. As I stated in my previous report, I have concluded that 1) the local laws have and will interfere with interstate commerce; 2) the primary benefits of these laws are chiefly financial; and 3) there are alternatives to obtain the non-financial benefits that do not impose an interstate burden. I address each of these conclusions in the context of Dr. Stavins' arguments below.

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[1] Expert Report of Mark P. Berkman, November 15, 2002.

III. Dr. Stavins Fails to Demonstrate that the Local Laws Have Not Burdened and Will Not Burden Interstate Commerce

4. Dr. Stavins asserts that the local laws as currently implemented may have actually increased interstate trade rather than restricting it. He comes to this assertion by claiming: first, that the Oneida Herkimer Waste Authority directed all waste to an out-of-state facility for a period; second, that the Authority's transfer stations promoted larger shipments earlier than would have been the case in an unfettered market, and third that absent the local laws, it is unlikely that waste would have been shipped out-of-state. He fails, however, to adequately support these claims.

5. The shipment of waste to an out-of-state landfill was the consequence of the Authority's failure to complete its comprehensive plan. It has been unable to construct a landfill within county borders. To take credit for promoting interstate trade when the plan calls for a complete restriction is disingenuous. As I pointed out in my previous report, if all counties had successfully followed plans similar to those of the Authority – which, by way of remainder, is precluded by State law from managing solid waste generated outside of Oneida and Herkimer Counties – there would have been no where to send Oneida and Herkimer County waste.

6. Dr. Stavins observation that the timing and size of the Authority's transfer stations promoted earlier and greater exports is incorrect. There is ample evidence that private transfer stations were becoming widespread when the Authority constructed its facilities. As of 1991 when the Authority first began operating a transfer station, approximately 41 percent

of such stations in New York State were private.[2] In addition, the size of the facilities does not necessarily promote longer distance hauls as Dr. Stavins suggests. While it is true that larger facilities may provide the means to spread capital costs across a larger number of tons (economies of scale) this advantage can easily be offset by location advantages offered by smaller facilities.[3] Smaller facilities may reduce collection and disposal route distances.[4]

7. Dr. Stavins admits that it is difficult to predict what share of waste would have been exported absent the local laws, but he allows that the share would have been small because so little waste has been exported from New York State when New York City is excluded. This is hardly the controlled experiment necessary to measure the impact of the local laws. In the absence of these laws and similar flow control ordinances in other New York counties, substantially more waste could easily have been exported. Landfill development in the state could have looked very different as well. Fewer facilities may have developed in the face of low cost competition from already licensed out-of-state facilities. Dr Stavins rejects my observations regarding the plans and actions of the plaintiffs in this case to export waste, describing them as qualitative not quantitative. The fact that these private firms were actively exporting waste and making investment plans to export more and that others could easily have followed suit in the absence of the local laws cannot be so easily

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[2] Based on transfer station data provided by Chartwell private transfer stations accounted for 39 percent based on waste volume handled.

[3] It is also important to note that the economies of scale in transfer stations are likely to be modest. These facilities are typically not capital intensive. Therefore, upfront costs are generally low.

[4] U.S. EPA, Waste Transfer Stations: A Manual for Decision Making

dismissed. Moreover, if the probability of out-of-state shipments was so low, there would have been no need to impose flow control in the first place.

8. Dr Stavins ignores the evidence that, especially with the introduction of large scale regional landfills and transfers stations, the reach of economic solid waste markets has expanded. As Robert Porter has observed, "On a planet honeycombed with nations, states, and counties, economic forces urge ever more intercounty, interstate, and international trade in waste."[5] Out-of-state disposal sites are clearly able to compete for waste generated in Oneida and Herkimer Counties and have done so. They would undoubtedly have been substantial players in the absence of the local laws.

IV. Dr. Stavins Fails To Demonstrate That The Local Laws Support Clear Non-Financial Benefits

9. Dr. Stavins ignores the fact that the local laws were clearly imposed, in part, to provide the means for the Counties to recover their losses associated with the failed Oneida Energy Recovery Facility (ERF), the associated ash landfill, and landfill planning and development. This accounts for more than 11 percent of the Authority's indebtedness.[6] This represents a purely financial benefit.

10. Dr Stavins asserts that the local laws' objectives represent legitimate public benefits. He focuses principally on the laws' objective to support recycling, which he notes is also favored by federal and state policy. Dr. Stavins argues that the presence of what economists refer to as externalities provides a

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[5] Robert Porter, The Economics of Waste, Washington D.C.: RFF Press, (2002) p. 103.

[6] See, M. Berkman, Expert Report, November, 15, 2002, Exhibit 4.

clear economic justification for government involvement to meet this objective.[7] He assumes, without support, that externalities are sufficiently great to support the Authority's recycling objectives and costs. I have seen no studies by Dr. Stavins or the Counties that support this assumption. The available evidence, in fact, suggests that the Authorities recycling costs exceed their benefits. Note that disposal costs at the Authority's facilities is currently $ 86 per ton. This exceeds the average landfill tipping fee in New York State by $34.30 per ton ($86-51.70).[8] This indicates that unless the externalities in disposal not already internalized approach this figure, that the Authority's program results in net costs to the Counties not benefits. Most, if not all externalities related to landfill waste disposal have been internalized. Landfills now operate under strict regulations and do not present substantial, if any, externalities.[9] Thus, unless program costs net of revenues plus this differential equal the benefits of recycling then the Counties are creating net costs not benefits. This is quite possibly the case.

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[7] Dr. Stavins provides the following technical definition of an externality: "whenever either the cost or benefit to society as a whole that results from a particular activity is different from the costs or benefits experienced by the individuals making decisions about the activity," Stavins Expert Report, p. 19. For a more specific example note that landfills and materials recovery facilities may create noise or traffic congestion. These are costs to society that are not reflected in the operating costs of the facilities. Unless regulations are imposed to curb these costs or taxes are imposed to reflect them, they remain external to the facility owners investment and operating decisions.

[8] Based on tipping fees reported in Solid Waste Digest, Northeast Region, August 2002.

[9] The U.S. EPA concluded that subtitle D landfills do not create externalities. See, U.S. EPA, Regulatory Impact Analysis for the Final Criteria for Municipal Solid Waste Landfills (EPA530-SW-91-073a and 073b), 1991.

11. This, however, is really not the venue to conduct a cost-benefit study of the Authority's program. The key issue under the Pike Test, assuming that County residents consider recycling a reasonable objective, is whether the objective could be met without burdening interstate commerce. I address this question below.

V. Dr. Stavins Fails To Demonstrate That The Restrictions Imposed By The Local Laws To Meet The Counties Objectives Could Not Be Met By Other Means Less Burdensome To Interstate Commerce.

12. Dr. Stavins concludes that, "I cannot conceive of any feasible alternatives [to flow control] that would offer the same level of public benefits".[10] He appears, however, to base this conclusion on only a cursory review of alternatives.

13. Even a brief review of recycling programs — the primary benefit of the Authority's plan according to Dr. Stavins — indicates that many local jurisdictions have achieved their recycling goals without flow control. Many have adopted unit pricing to achieve this.[11] For example, an EPA case study of jurisdictions relying on unit pricing to promote recycling and waste reduction did not find flow control a necessary condition for success.[12] In addition, EPA's "Decision Maker's Guide to Solid

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[10] Expert Report of Robert N. Stavins, January 10, 2003, p. 36.

[11] An EPA sponsored review of the literature on unit pricing found that it promoted recycling. See, Marie Lynn Miranda, et. al. "Unit Pricing Programs for Residential Municipal Solid Waste: An Assessment of the Literature," prepared for the Office of Policy, Planning and Evaluation, U.S. Environmental Protection Agency, March 1996.

[12] Scott Bauer and Marie Lynn Miranda, "The Urban Performance of Unit Pricing: An Analysis of Variable Rates for Residential Garbage Collection in Urban Areas," Nicholas School of the Environment, Duke University, April 1996.

Waste Management" make no mention of flow control in the chapter on recycling.[13]

14. For example, Portland, Oregon, which has a nationally recognized recycling program with a rate of 57%, relies on unit pricing without any restrictions on flow.[14] More than 50 private haulers serve Portland residents and select their own disposal destinations.[15]

15. Over 4,000 jurisdictions nationwide were found to employ unit pricing according to a recent survey.[16] Several communities in Oneida and Herkimer Counties have employed bag systems, a form of unit pricing, to manage waste and promote recycling. The Authority acknowledged these programs, but rejected this approach following only what appears to be a limited analysis.[17] The Authority did impose a uniform surcharge on non-recyclable waste at the origin, but did not explicitly indicate that flow control was a necessary complement.[18]

16. Dr. Stavins has not provided any reason why such a surcharge could not have been imposed absent flow control. Note that even if unit pricing required additional administrative costs without flow control, it would be this cost that should be balanced against the burdens on interstate commerce.

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[13] U.S. EPA, "Decision Maker's Guide to Solid Waste Management," Vol II, Chapter 6, Recycling.

[14] City of Portland, Office of Sustainable Development.

[15] Bauer and Miranda, p. 31.

[16] U.S. EPA, "Unit-Based Pricing in the United States: A Tally of Communities (http://www.epa.govicgibin/epaprintonly.cgi.

[17] See Defendants response to Interrogatory 4 and memorandum to Hans Arnold et al. from Pat Donovan, November 5, 1990.

[18] See memoranda to Hans Arnold from Patrick Donovan, May 3, 1991, May 5, 1991, and September 11th, 1991.

Executed this 29th of January, 2003, at Oakland, California.

/S/Mark P. Berkman
Mark P. Berkman

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

PLAINTIFFS' SUPPLEMENTAL RESPONSE TO DEFENDANTS' THIRD SET OF INTERROGATORIES

Pursuant to the Federal Rules of Civil Procedure and the Local Rules of the United States District Court for the Northern District of New York, plaintiffs United Haulers Association, Inc., Transfer Systems Inc., Bliss Enterprises Inc., Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial Containers, Inc., and Ingersoll Pickup, Inc. ("Plaintiffs"), by and through their attorney Kevin C. Murphy, Esquire, hereby supplement their responses to the Defendants' Third Set of Interrogatories as follows:

General Objections To Interrogatories

Plaintiffs refer to and incorporate by reference their general and specific objections to Defendants' Third Set of Interrogatories as set forth in Plaintiffs' responses dated July 9, 2002 as if fully set forth herein. Without waiving these objections, Plaintiffs supplement their responses as follows.

Interrogatories

1. Identify with specificity the Out-of-State Interest, if any, which the Plaintiffs intend to prove is adversely and disproportionately impacted, with respect to similarly situated In-State Interests, by the operation of the Flow Control Legislation and describe the injury suffered by such Interest.

Answer: The Oneida-Herkimer Flow Control Legislation interferes with the free and unfettered

movement of solid waste across intrastate and interstate boundaries by directing that all solid waste and designated recyclables be delivered to Authority facilities, thus precluding their delivery for processing, transport, disposal or recycling to facilities outside of the Authority's geographical boundary. Plaintiffs further contend that, given the above circumstance, the Flow Control Legislation facially discriminates against interstate commerce in that it excludes both in-state and out-of-state competition for waste and waste services and otherwise serves to isolate Oneida County and Herkimer County from the interstate waste market. Plaintiffs do not contend, based on its review of discovery material to date, that Out-of-State Interests are disproportionately impacted.

2. Identify the In-State Interest, if any, which the Plaintiffs intend to prove is disproportionately benefitted or favored, with respect to similarly situated Out-of-State Interests which exceed the burdens placed on In-State interests, which Plaintiffs intended to prove are the result of the operation of the Flow Control Legislation.

Answer: Plaintiffs will establish that the economic interests of Defendants are disproportionately benefitted and/or favored by the Flow Control Laws to the extent that the Flow Control Laws allow Defendants to set tipping fees at a rate designed to (1) obviate the need for any funding by Oneida or Herkimer County and (2) finance modified, additional and/or expanded facilities and programs at the ultimate expense of interstate commerce, including but not limited to, out-of-state waste generators and waste disposal services by impeding the availability of disposal services and options. Plaintiffs will further establish that Flow Control Laws disproportionately benefit and/or favor local economic interests by providing a financing mechanism for Defendants' proposed landfill which, in turn, will provide

Defendants with a mechanism to secure millions of dollars spent annually in out-of-region disposal and ensure that the same will remain in the local economy, again at the ultimate expense of interstate commerce, including but not limited to, out-of-state waste generators and waste disposal services by impeding the availability of disposal services and options and thereby driving up the cost of disposal for in-state and out-of-state waste generators and waste disposal services.

3. To the extent not contained in the response to Interrogatory No.1, above, describe with particularity any burdens placed on Out-of-State Interests which exceed the burdens placed on In-State Interests, which Plaintiffs intend to prove are the result of the operation of the Flow Control Legislation.

Answer: Based on the available record and documents reviewed to date and subject to expert review and analysis, Plaintiffs do not contend that the burden on Out-of-State Interests exceed the burdens on In-State Interests.

4. Identify any other disparate impact on interstate commerce which Plaintiffs intend to prove is caused by the operation of the Flow Control Legislation.

Answer: The Flow Control Legislation, by pre-determining and fixing tipping fees, effectively eliminates competition and innovation in the market and precludes access to competitive and innovative markets and thus restricts the flow of waste in inter-state commerce.

5. Identify any law, rule, regulation, or regulatory scheme of any State which the Plaintiffs intend to prove is in conflict with, or suffers interference from, the operation of the Flow Control Legislation and describe the nature of the conflict or interference.

Answer: The Flow Control Legislation is in conflict with Article I, Section 8, clause 3 of the United States Constitution such that it interferes with the free and unrestricted-flow of solid waste in interstate commerce. The Flow Control Legislation interferes with Title 13- FF of the Public Authorities Law in that the hoarding of recyclables interferes with the Legislature's finding "that it is the public policy of the state to encourage and support the role of the private sector in recycling and nothing in this act shall be interpreted as authorizing unfair competition between municipalities and scrap dealers, processors and consumers." Legislative Findings, L. 1988, c. 627, § 1. As set forth in response to interrogatory no. 2 above, the hoarding of solid waste restricts the availability solid waste and, therefore, revenue streams to non-designated facilities which, over time, will likely lead to the closure and elimination of non-designated facilities.

6. Identify any Persons whom Plaintiffs intend to call as witnesses to testify in support of the responses to each Interrogatory set forth above, and identify the factual issue to be addressed by each such witness.

Answer: Plaintiffs will potentially call a representative of each individually named plaintiff to testify regarding the nature of their business pre- and post-flow control and the impact of flow control on their respective businesses.

Plaintiffs anticipate providing an expert report(s) that generally addresses the impact of flow control on interstate commerce as well as potential alternatives to the subject Flow Control Laws.

Plaintiffs anticipate calling one or more representatives of the defendants to testify regarding the Flow Control Laws and the operations of the Authority.

Plaintiffs have not yet identified those witnesses or topics of inquiry with any further specificity.

UNITED HAULERS ASSOCIATION, INC., TRANSFER SYSTEMS INC., BLISS ENTERPRISES INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., and INGERSOLL PICKUP, INC.

Dated: September 12, 2002
Syracuse, New York

/S/ Kevin C. Murphy

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

EXPERT REPORT OF ROBERT N. STAVINS

I. INTRODUCTION

1. My name is Robert N. Stavins. I am the Albert Pratt Professor of Business and Government and Chairman of the Environment and Natural Resources Faculty Group at the John F. Kennedy School of Government, Harvard University, where I am also the Director of the university-wide Environmental Economics Program. In addition, I am the former Chairman of the U.S. Environmental Protection Agency's (EPA) Environmental Economics Advisory Committee, of which I have been a Member since it was founded in 1992. My scholarly research and my public policy engagement with Federal, state, and local governments have focused on the use of policy instruments to achieve environmental objectives, as well as the analysis of the benefits and costs of environmental and related public policies. During the course of my research, I have examined a wide array of policy areas, including solid waste management. I have written numerous articles that have appeared in leading economics journals and have authored or edited four books, including *Public Policies for Environmental Protection*. A more detailed description of my background and credentials, including a list of my publications, is available in the attached copy of my curriculum vitae (Appendix A).

2. I have been asked by Counsel for the defendants to provide an economic interpretation of the application of the *Pike* balancing test to Oneida County Local Law #1 of 1990 and Herkimer County Local Law #1 of 1990 (hereafter the "Local Laws"), which control the flow of local solid waste ("flow control"). I understand that the *Pike* balancing test, enunciated in *Pike v. Bruce Church Inc.*, 397 U.S. 137, 90 S.Ct. 844 (1970), is intended to assess the validity of statutes that regulate to achieve a legitimate local public interest in an even-handed manner, with only incidental effects on interstate commerce. In that Supreme Court decision, Justice Stewart wrote that a statute "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

3. In particular, I have been asked to inform the application of the *Pike* test to the laws of Oneida County and Herkimer County (hereafter "the Counties") by:

- Assessing whether these laws place a burden on interstate commerce.
- Examining the benefits of the laws and assessing whether there is evidence suggesting that any burden that these laws may place on interstate commerce is *clearly excessive* relative to those benefits.
- And, determining the extent to which feasible alternatives can achieve the same benefits as the existing laws while placing a lesser burden on interstate commerce.

In addition, I have been asked to review, assess, and comment on the report filed by the plaintiffs' expert, Dr. Mark Berkman.

4. As part of my work in this case, I have studied various documents that pertain to these issues. A list of the documents I have reviewed can be found in Appendix B.

5. I am being compensated for my work in this case at the rate of $500 per hour. My compensation is neither contingent on my findings nor on the outcome of this litigation. Part of the work for this investigation was performed by others under my direction. I have not testified at trial or in deposition on any matter during the previous four years.

6. In Section II of this report, I examine the history of the Local Laws, and what they require of those dealing with solid waste in the Counties. In Section III, I provide an assessment of those economic effects that may be relevant in evaluating burdens on interstate commerce posed by the Local Laws. In Section IV, I provide an economic perspective on the benefits sought by the Local Laws and the extent to which the Counties are succeeding in achieving those benefits. In Section V, I examine whether alternatives to flow control exist that could bring about the same level of public benefits. Finally, I present my conclusions in Section VI. But, first, I offer a brief summary of those conclusions.

Preview of conclusions

7. As a result of my work in this case, I have reached the following general conclusions, which are developed and discussed in detail in subsequent sections of this report:

- The Local Laws, as currently implemented, *do not place a qualitatively or quantitatively greater burden on out-of-state interests*, relative to similarly situated in-state interests. Indeed, there is reason to believe the defendants' waste management plan and associated

flow control may have *increased* interstate commerce relative to what would have occurred in their absence.

- If the Oneida-Herkimer Solid Waste Management Authority (hereafter "the Authority") does construct a public landfill, this will have the effect of reducing private commerce in general. There is nothing in the nature of such a reduction in private commerce that would disproportionately burden interstate commerce relative to in-state commerce. Moreover, substantial evidence suggests that the burden of such a reduction in private commerce would *fall most heavily on in-state disposal sites if the landfill were to be constructed today.*

- With or without such a public landfill, *there is no evidence to suggest that the Local Laws place any extraterritorial burden on interstate commerce.* That is, they do not increase the cost of waste disposal in the interstate marketplace for those outside the Counties.

- My economic assessment indicates that the objectives sought by the Counties' waste management plan produce *legitimate public benefits.* Moreover, the evidence indicates that the Counties have been successful in achieving these objectives.

- Unique characteristics of flow control significantly *enhance* the achievement of some of the public benefits. They also ensure the achievement of other benefits that would be *unachievable* in the absence of such flow control. Therefore, *feasible alternatives to flow control that have a lesser impact on interstate commerce could not yield the same level of public benefits.*

II. HISTORY AND DESCRIPTION OF THE COUNTIES' LOCAL LAWS

8. The flow control provisions at issue in this case were included in Oneida County Local Law #1 of 1990 and Herkimer County Local Law #1 of 1990, legislation that was adopted to support a comprehensive waste management plan developed by the Counties in the late 1980s. This plan arose during a period of heightened local, state, and national concern regarding solid waste management. The period was punctuated locally by, among other developments: increased public awareness of the existing solid waste infrastructure's environmental hazards; the naming of local businesses, municipalities, and school districts as third-party defendants in a federal clean-up action at a privately-owned, local landfill; and significant expressions of willingness on the part of residents to reduce their contributions to waste disposal levels by recycling.[1]

9. The realization of the Counties' waste management plan was made possible by the creation of the Authority in 1988, which implements the Counties' plan, and by the subsequent development of public, waste management infrastructure. This included the construction of two primary transfer stations, one satellite transfer station, convenience stations, a recycling center, a compost facility, and a household hazardous waste collection facility. In addition to managing the treatment of waste in accordance with the Counties' plan — including disposing of, composting, and recycling components of the waste stream — the Authority provides a number of additional public services, such as waste audits and educational programs. These programs are integrated to complement each other in a single system. All Authority activities are financed by a system charge levied on non-

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[1] *See* 'Solid Waste Practices and Citizen Attitudes Regarding Recycling in Oneida-Herkimer Counties,' William F. Cosulich Associates, P.C. & John Zobgy Associates Inc, New York, April 1988.

recyclable waste together with revenues derived from the sale of recyclable materials. Authority "tipping fees" for disposal of non-recyclable waste are set so as to assure that revenues are sufficient to cover the Authority's overall costs, and are generally higher than tipping fees charged by disposal facilities which do not provide or support similar recycling or other services.

10. The Local Laws, among other provisions, require that waste generators separate recyclable from non-recyclable waste.[2] While generators may arrange to have their recyclable material sent directly to a buyer outside the Authority's system, if they do not make such arrangements, they must place recyclables at curbside for delivery to the Authority. No fee is charged for delivery of recyclables. The Local Laws provide that private haulers must deliver all acceptable, non-recyclable solid waste and curbside collected recyclables generated within the Counties to an Authority-designated facility. Recyclable material left by generators at curbside is delivered to the Authority's recycling center, which processes and markets the material. Non-recyclable waste is brought to the Authority's transfer stations. This waste is inspected to ensure that it does not contain dangerous or hazardous materials and that trash collectors, and the generators they collect from, are complying with recycling requirements. Following this inspection, the waste is processed to facilitate transportation to its ultimate disposal site by a contractor chosen by the Authority through a periodic, open, and competitive bidding process.

11. Twice since implementing flow control, the Authority has selected contractors — and associated disposal sites for

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[2] This is consistent with New York State's commitment to source separation, codified in General Municipal Law 120-aa. *See* 'Are We Throwing it all Away? A Call for New York to Recommit to Recycling,' Office of New York Attorney General Eliot Spitzer, May 1, 2000, <http://www.oag.state.ny.us/press/reports/recycling/recycling.html>, visited January 5, 2002.

the Counties' non-recyclable waste — based on bids submitted in response to requests for proposals (RFPs). Firms offering disposal services were evaluated according to environmental, technical, financial, business, and cost criteria. As stated in the 1997 RFP, "The Agreement will be awarded to the most responsive and responsible Respondent demonstrating the requisite experience and skill in the necessary technologies, and proposing a plan that provides the most cost-effective method of disposing of solid waste with maximum protection of human health and the environment."[3]

12. The Authority's facilities and programs have replaced undifferentiated disposal of local waste with facilities and programs designed to manage and recycle specific components of the waste stream. Since 1989, the Authority has reliably and safely disposed of over 2.3 million tons of solid waste generated in the Counties.[4] Since the opening of the Materials Recovery Facility in 1991, the Authority has processed and sold over 370,000 tons of recyclable materials, yielding more than $13 million in revenues. These 370,000 tons are equivalent to the amount of landfill capacity used by the Counties over the course of one-and-a-half years. The cost of landfilling these recyclable materials, at $55 per ton, would have been over $20 million. Since the opening of the Green Waste Facility in 1992, the Authority has received and composted over 140,000 tons of yard debris, and made over 50,000 cubic yards of compost and mulch available to the residents of the counties. The avoided cost of landfilling these materials, at $55 per ton, is more than $7.5 million. Similarly, since its opening in 1993 the Household

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[3] *See* 'Request for Proposals, Solid Waste Processing, Transporting, and Disposal Service,' Oneida-Herkimer Solid Waste Management Authority, December 17, 1997.

[4] *See* Response to Plantiffs' Interrogatories, United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Authority, CV-95-0516, United States District Court Northern District of New York, August 30, 2002.

Hazardous Waste facility has received and reliably disposed of, or recycled, over 260,000 gallons of liquid hazardous waste.

13. While a private contractor is currently disposing of the Counties' non-recyclable waste, the Authority is engaged in the process of permitting a public landfill. In the event that that landfill is permitted and built, the Counties' non-recyclable waste will be directed to it. However, I have been informed that it is by no means certain that the proposed landfill will, in fact, be built.[5] If and when all the necessary permits are secured, the Authority's Board will need to decide whether to proceed with construction. It is my understanding that the decision will involve an assessment of the relative merits of building the landfill, compared to continuing to rely on the private marketplace for disposal. Consequently, in this report, I evaluate the Local Laws both as they are currently implemented and as they would be implemented if the public landfill were in operation.

III. BURDENS ON INTERSTATE COMMERCE

14. By virtue of the broad geographic scope of economic activity in the United States, virtually any state or local law having an impact on local commerce will, in turn, have some effect on interstate commerce. Therefore, in this section, I will focus on whether the economic effects of the Local Laws bring about conditions that are relevant in considering the extent to which those laws burden interstate commerce. I will assess whether the laws have a differential impact on interstate commerce, that is, whether their impact on interstate commerce is different from (greater than) their impact on in-state commerce. This will include consideration of whether the laws have a greater impact on out-of-state entities, relative to similarly situated in-state entities, and

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[5] *See* 'Memorandum Re: Status and Future Steps for Development of Proposed Regional Landfill,' Oneida-Herkimer Solid Waste Management Authority, December 31, 2002.

whether the Local Laws impact commerce beyond that which entities in the Counties would be directly involved in (i.e., whether they have an extraterritorial effect).

15. In evaluating the impacts of the Local Laws on interstate commerce, it is useful to divide the waste industry into four segments, based on the activity that occurs in those segments: waste generation; collection; processing prior to the final disposition of waste; and the final disposition of waste, such as through disposal in a landfill or recycling. By examining each of these segments in the following paragraphs, I address impacts of the Local Laws that could constitute a burden on interstate commerce.

16. The Local Laws pertain exclusively to waste collected in the Counties. Therefore, their impact on waste generators is limited to those generators in the Counties.[6] As I discuss in a later section, while the Local Laws indirectly impose financial costs on the Counties' waste generators, these costs are offset by financial and non-financial benefits that accrue both to the individual generators and to the Counties as a whole.

17. The Counties' laws affect firms that collect waste in the Counties. These firms face higher disposal costs for non-recyclable waste as well as other restrictions on their operations, such as the requirement to provide recyclables collection. Because this burden is faced by any entity that

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[6] Dr. Berkman argues that the laws may cause some inefficiencies in waste collection in neighboring counties, which would, in turn, burden generators in those counties. This would result from the impact of the flow control laws on haulers whose operations extend beyond the two counties in such a way that operations in those counties directly affect operations in neighboring counties (e.g., actual collection routes cross county borders). Yet, Dr. Berkman has provided no specific factual evidence to suggest that these inefficiencies exist and are of a non-trivial magnitude. Nonetheless, while it is theoretically possible that the flow control laws could affect haulers and, in turn, waste generators in neighboring counties, they would not affect out-of-state generators.

collects waste in the Counties, it is likely to be passed on to waste generators in the form of higher prices. This was confirmed in plaintiff depositions.[7] Nonetheless, it is possible that some increased costs faced by collectors due to the waste management plan would not be passed on to their customers. Such burdens would be limited to a collector's operations in the Counties,[8] and there is no reason to believe they would be qualitatively or quantitatively different depending on whether a collector was an in-state or out-of-state business.

18. As the Local Laws require that all collected non-recyclable waste be brought to the Authority's transfer stations prior to ultimate disposition, the laws deny the opportunity for private businesses to process the Counties' waste prior to final disposal.[9] The laws essentially remove the Counties' waste from private commerce in this stage of the waste management process. Because all processing in preparation for long distance transport must be done locally, this burden clearly falls on in-state commerce.

19. In considering impacts on interstate commerce in regard to the final disposition of waste, it is worthwhile to address separately recycled and non-recycled waste. Through the

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[7] *See* Examination Before Trial of Marcella Guerriero, Plaintiff, Taken By The Defendants, Pursuant To Notice, United States District Court Northern District of New York, December 17, 2002.; Examination Before Trial of Thomas Ingersoll, Plaintiff, Taken By The Defendants, Pursuant To Notice, United States District Court Northern District of New York, December 16, 2002.; Examination Before Trial of David Levitt, Plaintiff, Taken By The Defendants, Pursuant To Notice, United States District Court Northern District of New York, December 13, 2002.; Examination Before Trial of Kenneth Wittman and Joan Wittman, Plaintiffs, Taken By The Defendants, Pursuant To Notice, United States District Court Northern District of New York, December 10, 2002.

[8] *See* note 6.

[9] In this report, the term "processing" is used to describe the receipt of waste from local collectors, and subsequent preparation of that waste for transport to its final disposal site.

many means by which it encourages recycling, the Local Laws increase the availability, or supply, of recyclable materials for all entities that use those materials. In turn, this leads to greater interstate commerce in recyclables. Indeed, firms in numerous states and Canadian provinces have purchased the Counties' recyclable material. The increased availability of these materials would benefit local interests more than out-of-state interests only to the extent that they are geographically closer to the source of additional supply.

Economic effects on the waste disposal marketplace

20. The segment of the waste industry that I discuss in greatest depth is that involving disposal of non-recyclable waste. This segment is also the focus of Dr. Berkman's report. As currently implemented, the ultimate impact of the Local Laws does not impede interstate disposal of the Counties' waste. In fact, the Local Laws may have accelerated the growth in interstate shipments of the Counties' waste. This is suggested both by the economic effects of the Local Laws and by historical fact.

21. While the Local Laws deny collectors the right to directly send waste into the disposal marketplace, the ultimate demand for disposal in the interstate marketplace is largely unchanged. Demand for disposal from numerous collectors is replaced by the Authority's demand for disposal of roughly the same amount of waste. Total demand for disposal is reduced somewhat due to increased recycling and reduced waste generation, both of which are encouraged by incentives arising from flow control.[10] The ability of out-of-state disposal sites to meet that demand, relative to their in-state competitors, is in no way lessened by the laws.

22. After being processed at the Authority's transfer stations, the Counties' non-recyclable waste is transported to a disposal site by a contractor periodically chosen by the

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[10] This is a significant social benefit of the system, as I discuss later.

Authority. While the choice of a contractor, and that contractor's disposal site(s), involves considerations beyond financial costs, including environmental considerations, it does not depend on whether the disposal site is inside or outside of New York State. Moreover, there is no reason to believe that the evaluation process would incidentally favor in-state over out-of-state sites, aside from costs associated with shipping waste greater distances. In fact, in 1991, the Authority chose a contractor that used an out-of-state landfill. As a result, from 1991 to 1998, the Counties' non-recyclable waste entered interstate commerce.[11,12] Indeed, the contention that the Local Laws burden interstate commerce appears dubious in light of this readily observable historical fact. Moreover, while the current contractor disposes of the Counties' waste in New York State, the Authority's agreement with the contractor allows for the disposal of waste at an out-of-state site.

23. An out-of-state landfill's ability to compete with a local landfill for a county's waste depends to a great extent on whether its disposal fees are low enough to justify the

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[11] While the Counties continued to dispose of some waste locally at the Authority's energy recovery facility from 1991 to 1995, that facility shut down in 1995. From 1995 to 1998, all the counties' non-recyclable waste that was delivered to the Authority was shipped out-of-state. *See* United Haulers Association v. Oneida-Herkimer Solid Waste Management, Docket No. 00-7593, 00-7595, 00-7597, United States Court of Appeals for the Second Circuit, decided July 27, 2001; 'Memorandum Re: Disposal of Waste Before 1988,' Oneida-Herkimer Solid Waste Management Authority, January 7, 2003.

[12] It is worth noting that while flow control led to interstate shipments of the counties' non-recyclable waste from 1991 to 1998, certain haulers that violated the flow control laws during this period, by disposing of waste outside the Authority's system, disposed of waste in-state rather than outside New York. *See* Examination Before Trial of Kenneth Wittman and Joan Wittman, Plaintiffs, Taken By The Defendants, Pursuant To Notice, United States District Court Northern District of New York, December 10, 2002.

increased transportation costs of shipping waste to its site.[13] Hence, the extent of interstate commerce will depend on both transportation costs and the differences between disposal fees among sites in the various states. The additional transportation cost associated with using a more-distant site is determined by the incremental cost of shipping a given amount of waste one mile (the per-mile cost) and the additional distance that must be traveled. Therefore, the lower the per-mile cost of shipping waste, the lower the additional transportation costs are for using more-distant sites, and hence the greater the potential for interstate commerce.

24. The infrastructure in place for shipping waste in any county significantly affects per-mile transportation costs. Although transfer stations like those operated by the Authority require up-front capital expenditures to build, and on-going fixed operating costs to maintain, they substantially lower the per-mile cost of shipping waste. By making it possible to combine waste from multiple collection trucks for shipment in one, larger truck, transfer stations yield savings in labor, fuel, and equipment costs associated with transporting waste. Given the transfer stations that the Authority has put in place, it is unlikely that the per-mile cost of shipping the Counties' waste would be lower in the absence of flow control.[14] Thus, in the absence of flow

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[13] While focusing on the use of landfills as a disposal method in this section, I recognize that other disposal options, such as incineration, are also available to the Authority and the private sector.

[14] In 2001, the Authority's two transfer stations together served as the point of origin for the shipment of more than 260,000 tons of waste. *See* 'Oneida-Herkimer Solid Waste Authority, 2001 Annual Report,' Oneida-Herkimer Solid Waste Management Authority, 2001. Conversations with Authority officials and an outside expert suggest that, given the size of this waste stream, there are little, if any, additional opportunities to reduce the per-mile cost of transporting the waste out of the Counties (Conversation with Jim Heil, January 6, 2003).

control, the ability of out-of-state disposal sites to attract the Counties' waste would not be any greater.

25. Not only is there no reason to believe that the Local Laws have limited interstate commerce, they may actually have accelerated the growth of interstate commerce. Prior to the enactment of flow control, little of the Counties' waste was shipped out of state, and the transfer station infrastructure that now exists was not in place.[15] Private haulers could have — and likely would have eventually — built transfer stations similar to those established by the Authority. Yet, their incentive to do so would not have been as great. The incentive for private haulers to build transfer stations results from the comparison of the costs associated with building and operating them to the benefits of greater disposal options and lower transportation costs. Because the Authority would have derived significant benefits from the transfer stations in *addition to* reduced transportation costs and greater disposal options — as the stations were integral to many aspects of the waste management plan — their incentive to build such stations was certainly greater. Therefore, in the absence of the Local Laws, the private sector may not have established transfer stations as early as the Authority did, and the per-mile cost of shipping waste from the Counties may not have declined as soon as it did (See Appendix C for a more complete explanation).

26. In addition, the Counties' waste management plan may have made interstate shipments more likely because of its commitment to balancing cost and environmental considerations in choosing a disposal site. The Pennsylvania landfill, where the Counties' non-recyclable waste was disposed of from 1991 to 1998, offered competitive disposal rates. Yet, shipping certain types of waste to a Pennsylvania

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[15] *See* United Haulers Association v. Oneida-Herkimer Solid Waste Management, Docket No. 00-7593, 00-7595, 00-7597, United States Court of Appeals for the Second Circuit, decided July 27, 2001.

landfill also involved substantial upfront transaction costs to comply with Pennsylvania's environmental regulations, including requirements for costly waste audits.[16] These regulations were more stringent than those in New York State. Despite the competitive disposal rates, such transaction costs could have discouraged private haulers from shipping some of the Counties' waste to this disposal site, or any other Pennsylvania landfill. But, because of the Counties' focus on environmental considerations and related social benefits, they chose the Pennsylvania site despite the transaction costs that were thereby incurred.

27. Historical evidence is also consistent with the idea that the Counties' flow control promoted interstate commerce. Prior to 1991, nearly all of the Counties' waste was disposed of at several local landfills.[17] From 1991 to 1998, with the exception of a limited amount of waste that was incinerated locally at the Authority's energy recovery facility from 1991 to 1995, all of the Counties' non-recyclable waste that was delivered to the Authority's facilities was shipped to an out-of-state landfill. While I could not obtain records for earlier years, in 1997 and 1998, the Authority's shipments made up nearly all of the exports of waste from those areas of New York State that comprise the Department of Environmental

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[16] In order to dispose of non-hazardous industrial waste in the Pennsylvania landfill, the Authority had to test and profile over 300 of the counties' industrial and commercial waste streams. These waste streams were then subject to cradle-to-grave tracking systems that documented the content of the waste, the chain of custody, how it was handled at each stage, whether it was commingled with other waste, and its condition upon delivery to the landfill. This procedure ensured the separation of types of waste that could be dangerous if combined. It also provided the counties' industrial and commercial waste generators with legal documentation of proper handling and disposal. See 'Memorandum Re: Environmental Review and Pennsylvania Solid Waste Management Regulations,' Oneida-Herkimer Solid Waste Management Authority, December 21, 2002.

[17] *See* 'Memorandum Re: Disposal of Waste Before 1988,' Oneida-Herkimer Solid Waste Management Authority, January 7, 2003.

Conservation's (DEC) Regions Four through Eight.[18] Together, these regions in upstate New York account for one quarter of New York State's population.

28. In his expert report, Dr. Berkman concedes that there have been interstate shipments of waste since the implementation of flow control, but asserts that "more landfills would be involved absent the single point of access created by the Flow Control Laws."[19] In making this argument, Dr. Berkman focuses on impacts on the *number* of out-of-state sites disposing of the Counties' waste as an indication of burdens on interstate commerce, rather than focusing on the *quantity* of waste being shipped across state borders or the *intensity* of interstate competition. Indeed, from 1995 to 1998, the amount of the Counties' waste entering interstate commerce was at its highest possible level even though only one out-of-state entity was involved in disposing of it.[20] Dr. Berkman has not made a compelling argument for why the *number* of out-of-state sites disposing of the Counties' waste should be a more important consideration than the actual *quantity* of waste going into interstate commerce. Indeed, were he to pursue his own line of argument, it seems he would also conclude that the entry of large, efficient, private landfills may actually harm interstate commerce if that entry foreclosed entry opportunities for more numerous, small, less-efficient landfills, because it would lead to disposal at fewer sites.

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[18] *See* 'Where Will the Garbage Go? 1998,' New York State Legislative Commission on Solid Waste Management.; 'Where Will the Garbage Go? 1999,' New York State Legislative Commission on Solid Waste Management.

[19] *See* Expert Report of Mark Berkman November 15, 2002. page 8.

[20] As mentioned above, while an out-of-state landfill was used for disposal from 1991 to 1998, some of the counties' waste was incinerated locally from 1991 to 1995. *See* United Haulers Association v. Oneida-Herkimer Solid Waste Management, Docket No. 00-7593, 00-7595, 00-7597, United States Court of Appeals for the Second Circuit, decided July 27, 2001.

29. In summary; it is clear that, as currently implemented, the Local Laws do not impose a burden on interstate commerce that is *qualitatively or quantitatively different* from that on in-state commerce. In fact, it is unlikely that interstate shipment of the Counties' waste could be any more economically attractive in the absence of flow control; and interstate shipment of the Counties' waste may not have come about as quickly in the absence of flow control. Yet, in addition to addressing the impacts of the Local Laws as they are currently implemented, given that the Authority is in the process of permitting a public landfill, it is worthwhile to discuss the likely impacts of the Local Laws in the event that the landfill is built and operated.

Impact of the proposed landfill on interstate commerce

30. The proposed public landfill would remove the Counties' waste from private-sector commerce, reducing demand for disposal at any private site regardless of whether that site is in-state or out-of-state. Nothing in the nature of this demand reduction suggests there would be a differential effect on out-of-state landfills relative to in-state landfills. The direct burden this places on a given landfill depends on whether that landfill would have been likely to receive the Counties' waste in the absence of flow control. Therefore, the relative impact of this demand reduction on interstate commerce, at a given point in time, would be determined by the extent to which landfills that would have received the Counties' waste in the absence of flow control happen to be located outside New York.

31. Although it is not possible to determine definitively what share of waste would be disposed of out-of-state in the absence of the Local Laws, several factors suggest that little, if any, would be disposed of outside New York. First, only 0.5 percent of the waste exported from New York State in 2000 originated north or west of Sullivan, Ulster, and Dutchess Counties (see Exhibit 1). Moreover, that 0.5

percent was exported from counties in the extreme west of New York State.[21] Second, while Oneida and Herkimer Counties' waste was exported from 1991 to 1998, the fact that a competitive bidding process has resulted in the Counties' waste currently being disposed of at an in-state disposal site suggests that that landfill would be a likely recipient of much of the Counties' waste even in the absence of the Local Laws. Indeed, only that landfill stands to lose business directly if the proposed public landfill is built.

Impacts of widespread adoption of flow control on interstate commerce

32. Dr. Berkman's final rgument about the impact of the Counties' Local Laws on interstate commerce goes well beyond the impact of the Counties' system and considers what would happen if that system were widely adopted across and throughout the United States. He concludes that "the Counties' Flow Control laws, especially once fully implemented, if widely followed by other local governments, would severely restrict or eliminate interstate commerce."[22]

33. Dr. Berkman's argument fails to distinguish between municipalities that, in adopting flow control, would build new local public disposal facilities, and those that would just build public transfer stations, using flow control to achieve the desired public benefits while still relying on the private, interstate marketplace. Of course, the Authority took the latter approach in 1991. As I mentioned above, in deciding whether it will build a public landfill, the Authority will weigh any increase in costs that such an approach entails —

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[21] Long Island and New York City were the source of 89 percent of New York's exported waste, and slightly more than 10 percent of New York's exported waste originated in the 7 counties immediately north of New York City. *See* 'Where Will the Garbage Go? 2001,' New York State Legislative Commission on Solid Waste Management, April 2002. <http://assembly.state.ny.us/comm/SolidWaste/20020513/#Tables>, visited December 22, 2002.

[22] *See* Expert Report of Mark Berkman November 15, 2002. page 9.

relative to continuing to rely on the interstate marketplace — against the public benefits such a landfill could yield above and beyond those provided by private disposal options. Therefore, the degree to which widespread adoption of the Counties' waste management approach would result in more public landfills depends significantly on any cost advantage of continuing to rely on the interstate marketplace. Flow control laws do not alleviate problems of facility siting. If they adopted flow control, municipalities with high population densities and without suitable, undeveloped land would likely continue to rely on private landfills, which may involve interstate shipments. Hence, widespread adoption of the Counties' waste management approach and associated flow control does not imply widespread construction of public landfills. The fact that the public benefits of flow control directing waste to a public landfill may exceed their costs in Oneida and Herkimer Counties does not imply that the benefits would exceed costs in every county. In the following paragraphs, I will separately address the implications of widespread adoption of flow control that only involves construction of public transfer stations, and that which involves the construction of local public landfills.

34. I have already established that, given the manner in which the Local Laws are currently implemented, it is unlikely that interstate shipment of the Counties' waste could be any more economically attractive, and that flow control may actually have had a positive impact on interstate commerce. The Local Laws led to the delivery of waste to publicly funded transfer stations; and I have found no evidence to suggest that the absence of flow control could have brought about lower costs of — and thereby greater incentives for — interstate waste transportation than is made possible by those stations. Moreover, interstate shipments may have come about earlier than would have been the case in the absence of flow control. Were more municipalities to implement flow control in the manner that the Authority has

implemented it, inevitably some would build transfer stations that private firms would not find it profitable to build. These publicly funded transfer stations would facilitate the interstate shipment of waste that was previously disposed of locally. Therefore, widespread adoption of the Local Laws, as currently implemented, may lead to increased interstate commerce and increased competition in the waste disposal marketplace.

35. Widespread adoption of flow control that involves the construction of public landfills would have effects similar to those if the Authority were to construct its proposed landfill. Nothing in the nature of the resulting reduction in demand for private sector waste disposal would suggest that there would be a differential impact on interstate, relative to in-state, commerce. The extent to which the two are reduced would largely depend on the relative share of interstate and in-state commerce in the marketplace for waste disposal. It is estimated that just ten percent of municipal solid waste in the United States enters interstate trade.[23] Therefore, there is no doubt that the removal of waste disposal from private commerce, that would accompany widespread building of public landfills, would have a quantitatively *greater* impact on in-state, rather than interstate private commerce.

Extraterritorial impacts on interstate commerce

36. It is also worthwhile to consider the impacts on municipalities that would continue to rely on private-sector waste disposal in the event that the building of public landfills, and associated flow control, were widely adopted. Given that the supply of private landfill capacity cannot quickly adjust to a reduction in demand — that is, it is relatively fixed in the short-term — the resulting reduction in demand for disposal at private landfills would likely lead to a reduction in disposal fees for those that continue to dispose

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[23] Porter, R., *The Economics of Waste*, Resources for the Future, Washington D.C. 2002. page 103.

of waste in the private-sector marketplace. In other words, rather than placing an extraterritorial burden on those communities continuing to rely on interstate disposal of their waste, widespread adoption of flow control and building of public landfills would reduce their disposal costs.[24]

Summary

37. The Local Laws affect local waste generators, haulers, and potential local processors of waste by increasing disposal costs for haulers, and hence generators, and bringing waste processing prior to final disposal into the public sector. Yet, as they are currently implemented, the Local Laws only reduce the ultimate demand for waste disposal in the private, interstate marketplace by the degree to which they lead to increased recycling and reduced waste generation. The process by which bids are evaluated for disposal of the Counties' waste in the private-sector marketplace confers no advantage on in-state interests relative to out-of-state interests. In fact, the implementation of the Local Laws may have accelerated the growth of interstate commerce, and it has resulted in an incentive for interstate disposal that is likely to be as great as that which would exist in their absence. In the event that the Authority does build a public landfill to which it directs all of the Counties' waste, the result would be a reduction in private commerce in waste disposal — a reduction that would have a greater effect on in-state rather than out-of-state landfills. *In conclusion, the Local Laws, with or without the proposed public landfill, do not place a qualitatively or quantitatively greater burden on out-of-state interests, relative to similarly situated in-state interests. Moreover, there is no evidence to suggest that the Local Laws place any extraterritorial burden on interstate commerce.*

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[24] This result is found in scholarly research on the impact of flow control. *See* Ley, E., Macauley, M., and Salant, S., 'Restricting the Trash Trade,' *American Economic Review*, Vol. 90, Issue 2, 2000. pages 243-246.

IV. PUBLIC BENEFITS

38. The Local Laws are an integral part of the waste management plan implemented by the Authority. It is my understanding that this plan is meant to ensure that the Counties' waste is addressed in a manner that maximizes local public benefits. The general nature of the benefits sought can be found in the objectives of the Local Laws, described in Robert Julian's affidavit, which include:[25]

- Providing reliable waste management service while protecting public health, safety, and welfare.
- Replacing high volume, undifferentiated waste disposal methods with a system that would match the best management method to each component of solid waste.
- Making waste reduction and recycling legally mandated top priorities for solid waste management.
- Establishing and expanding markets for recyclables.
- Conserving vital natural resources.

39. In this section, I establish evidence both that these are indeed legitimate public benefits, and that the Counties' plan has significantly contributed to achieving them. In a subsequent section, in which I discuss alternatives to flow control, I make clear how flow control plays an integral and ultimately necessary role in allowing the Counties' plan to achieve these benefits.

The social benefits in the objectives sought by the Authority

40. The fact that the Local Laws' objectives represent legitimate public benefits, justifying local government involvement, can be established not only by appeal to

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[25] *See* Affidavit in Opposition of Robert Julian, July 5, 1995. pages 23-24.

developments in solid waste policy at the national and state level, but also by appeal to the economics underlying the objectives. It is essential to note a particular economic characteristic of many of the outcomes that the plan promotes: the presence of what economists call "externalities." An externality is present whenever either the cost or benefit to society as a whole that results from a particular activity is different from the private costs or benefits experienced by the individuals making decisions about the activity.[26] For example, when an individual engages in recycling or appropriate disposal of household hazardous wastes,[27] the overall social benefit arising from the activity will be greater than the benefit s/he directly derives from that activity. This is because, while s/he clearly benefits from disposing of unwanted waste, others may also benefit from the reduced environmental impacts that her/his decision to recycle or appropriately dispose of hazardous waste brings about. Because individuals may not take into account these impacts on others in choosing how to dispose of waste, in the absence of government intervention, even if the social benefits of recycling or appropriate disposal of hazardous waste exceed their costs, individuals responding to solely *private* incentives may not engage in those activities unless the private benefits they derive exceed the private costs they incur. Therefore, without government intervention, certain

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[26] For a given activity, an externality is specifically defined as the difference between its benefit (cost) to society as a whole and its benefit (cost) to the individuals actually engaged in the activity. See Stiglitz, J., *The Economics of the Public Sector*, W.W. Norton and Company, New York, 2000. pages 214-217.

[27] Throughout this report, I refer to "appropriate" or "proper" disposal of household hazardous wastes. In so doing, I am distinguishing proper disposal from legal disposal. While, in some cases, it may be legal to dispose of these wastes in the trash, proper disposal can be taken to mean the disposal method that minimizes environmental risk, such as bringing the waste to a designated household hazardous waste collection facility. Other improper disposal methods include pouring liquid hazardous wastes down the drain.

activities involving externalities may not take place to the extent that is socially desirable. Moreover, many of the social benefits derived from these activities may not be financial in nature. For example, while perhaps yielding no revenues, an expanded household hazardous waste program results in increased environmental protection by making it easier for small quantity generators to properly dispose of those wastes, and thereby increasing the likelihood that they will do so.

41. Two important implications arise from the presence of externalities in outcomes promoted by the Counties' plan. First, their presence justifies government involvement. While federal and state government involvement, such as regulation of landfills, may respond to some externalities associated with waste management, local government involvement remains necessary. Such local government involvement can both reinforce federal and state involvement and address externalities that are of a particularly local nature. Second, even if the social benefits of government efforts to promote certain activities exceed their costs, much of the social benefits may not be financial in nature. Therefore, the financial benefits of some socially desirable government efforts may be less than their financial costs.

42. Dr. Berkman does not appear to appreciate the presence of externalities in assessing the public benefits of the Counties' waste management system. At one point, Dr. Berkman seems to call into question whether the Counties are achieving benefits from flow control because the Authority's household hazardous waste, composting, and materials recovery facilities have operated at a financial loss in most years.[28] As discussed above, these programs are supported by the system charge on non-recyclable waste and are not structured to generate fee revenue, but to encourage greater separation and delivery of material. Desirable government activities that are socially beneficial because

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[28] *See* Expert Report of Mark Berkman, November 15, 2002. Exhibit 6.

they are designed to address externalities will not necessarily be financially profitable.

43. Having discussed the economic arguments that establish the Counties' objectives as legitimate public benefits, in the following paragraphs I will discuss the extent to which the Counties' waste management plan is achieving those public benefits. The Authority and the Counties identify a broad range of benefits provided by the Local Laws and the solid waste management plan, along with specific examples and measures of how the plan is achieving those benefits.[29] These include, among others, benefits related to planning and administration, public participation and public education, recycling, composting, and environmental security. In the following paragraphs, I will highlight a few benefits that demonstrate both the presence of externalities in the actions promoted by the plan and the extent to which the Counties' plan has led to a high-level of achievement of those actions.

Recycling

44. One of the main objectives of the waste management plan is to maximize recycling. Not only is this goal consistent with New York State's waste management hierarchy, but the public benefits, or positive externalities, associated with recycling have been examined by numerous scholarly and government studies. These externalities include those environmental benefits that arise from reductions in the amount of waste landfilled — as well as the actual number of landfills built — and reductions in the extraction of natural resources.[30,31] In addition, research has found that individuals

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[29] The Authority and the counties comprehensively identify these benefits in their response to the plaintiffs' interrogatories. *See* Response to Plantiffs' Interrogatories, United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Authority, CV-95-0516, United States District Court Northern District of New York, August 30, 2002.

[30] While environmental regulations established during the 1980s have significantly reduced the environmental damages associated with landfills, several environmental externalities remain. The magnitude of

place a significant value on having recycling opportunities available to their community.[32]

45. The Counties' waste management plan and the Local Laws have facilitated a high level of recycling. The success of the Counties' recycling program can be seen in a number of ways. Oneida County was the second county in the state to adopt mandatory recycling laws and, together, the Counties have since continued to enhance their recycling capacity. The Authority accepts and recycles over 33 different types of waste products, including oils, paints, batteries, electronic components and particular grades of paper and plastic products which are not commonly recycled by other public or private waste management programs.[33] Its recycling efforts

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some externalities, such as greenhouse gas emissions, is related to the amount of waste disposed of in landfills. Other externalities, such as those associated with negative impacts on nearby property values, are related to the actual number of landfills built. Still others are related to a combination of both factors, such as the possibility for contamination of land or groundwater despite existing landfill regulations. *See* Porter, R., *The Economics of Waste*, Resources for the Future, Washington D.C. 2002. pages 64-60, 133-139.; Kinnaman, T., 'Explaining the Growth in Municipal Recycling Programs,' *Public Works Management and Policy*, Vol. 5, No. 1, July 2000. pages 37-51. reprinted in Kinnaman, T., and Fullerton, D. *The Economics of Household Garbage and Recycling Behavior*, Edward Elgar, Northampton, MA. 2002. pages 153-167.; 'Are We Throwing it all Away? A Call for New York to Recommit to Recycling,' Office of New York Attorney General Eliot Spitzer, May 1, 2000, <http://www.oag.state.ny.us/ press/reports/recycling/recycling.html>, visited January 5, 2002.; 'Municipal Solid Waste (MSW): Basic Facts,' Environmental Protection Agency, <http://wvvvv.epa.gov/epaoswer/nonhw/muncpl/ facts.htm>, visited November 12, 2002.

[31] Environmental benefits associated with reduced extraction of natural resources include reduced habitat destruction and reductions in pollution that may accompany such extraction.

[32] *See* Kinnaman, 2002.

[33] *See* 'Items Recycled by Oneida-Herkimer Solid Waste Authority and Which May Not Be Recycled By Other Counties,' Oneida-Herkimer Solid Waste Management Authority, 2002.; 'Oneida-Herkimer Solid Waste Authority System Improvement Schedule,' Oneida-Herkimer Solid

have received attention in the trade press and, in 2001, the Authority was formally recognized for its efforts by the Governor's Waste Reduction and Recycling Program Achievement of Excellence Award.[34]

46. In his expert report, Dr. Berkman seeks to question the extent to which the Counties' laws have contributed to recycling and composting by presenting a table that compares the Authority's recycling rates to those of other New York State solid waste management planning units.[35] To construct this table, Dr. Berkman uses data from *The New York State Recycling Bulletin 1999 Edition*, a New York DEC publication.[36] Yet, for two key reasons, the data in this publication can neither be used to provide an accurate assessment of Oneida and Herkimer Counties' recycling success relative to other planning units, nor to measure the extent to which Local Laws have increased recycling rates: (1) the various planning units' data are incomparable and subject to significant error; and (2) any comparisons that are nonetheless attempted fail to consider the effects of factors that influence recycling rates other than government initiatives. First, the types of waste that planning units count in estimating the amount of waste generated prior to recycling — the denominator in a calculation of the recycling rate — varies across planning units.[37] For example, some

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Waste Management Authority, April 2001; Patrick, M., 'Oneida Co. Oks Recycling Law,' *Observer Dispatch*, Utica N.Y., Thursday, July 28, 1988. pages 1A and 8A.

[34] *See* Pataki, G., '2001 Governor's Waste Reduction and Recycling Program Achievement of Excellence Award,' The State of New York Governors Office, October 22, 2001.

[35] *See* Expert Report of Mark Berkman, November 15, 2002. Exhibit 8.

[36] *See* 'The New York State Recycling Bulletin 1999 Edition,' New York State Department of Environmental Conservation, <http://www.dec.state.ny.us/website/dshm/redrecy/bulletin 99.pdf>, visited December 31, 2002.

[37] This was determined by an assessment of the raw data that some planning units provided to the DEC and by information provided by

planning units report sewage sludge, while others do not. In addition, while some planning units, such as the Authority, are significantly involved in day-to-day waste management and can produce waste generation and recycling estimates based on actual data, other planning units that are less involved must estimate these data. Not only does this lead to significant variation in the quality of data reported but, in at least one case, this estimation proved so difficult that a planning unit did not report an entire category of waste.[38] Such variation in both the accuracy and nature of data being used by Dr. Berkman make any comparison of resulting recycling rates subject to substantial error.

47. Putting aside this significant problem, Dr. Berkman's comparison of recycling rates fails to take into account significant differences among planning units that can cause recycling rates to vary dramatically among those units. Among the differences are the relative share of residential and commercial waste in a planning unit's waste stream and the type of businesses located in a planning unit. Certain types of businesses will have a higher percentage of easily recyclable material in their waste streams than others.

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administrators of planning units. *See* Chemung County Annual Recycling Report, New York State Department of Environmental Conservation, 1998.; Fulton County Annual Recycling Report, New York State Department of Environmental Conservation, 1998.; Oneida-Herkimer Counties Annual Recycling Report, New York State Department of Environmental Conservation, 1998.; Western Finger Lakes Annual Recycling Report, New York State Department of Environmental Conservation, 1998.

[38] Sharon Lilla, Administrator of the Western Finger Lakes Authority, informed me that she did not include non-hazardous industrial waste in her calculation of waste generated because, given the information available to her, she had little ability to provide a reliable estimate. This category of waste made a non-trivial contribution to overall waste generation in other planning units. *See* Lilla, S. 'Memorandum Re: NYS DEC Reporting,' Western Finger Lakes Solid Waste Management Authority, January 6, 2003.

48. For the same reason that Dr. Berkman's exhibit cannot be used to compare the success of various counties in promoting recycling, it also cannot be used to indicate the impact of flow control on recycling rates in Oneida and Herkimer Counties. The appropriate question to ask in determining the role of flow control in promoting recycling is: how much lower would recycling rates be in Oneida and Herkimer Counties in its absence? By presenting his exhibit, which shows some planning units with higher recycling rates that did not employ flow control, Dr. Berkman seems to be suggesting that the Counties' recycling rates could be as high or even higher in the absence of flow control. Yet, for the reasons cited above, such a conclusion cannot be made by a simple comparison of the Counties' recycling rate with that of other planning units. A proper analysis would have to control for other factors, some of which are mentioned above, that also affect recycling rates. Then and only then could a proper analysis estimate the impact of flow control on recycling rates. Since such an analysis has not been carried out, the degree to which the Counties have maximized recycling must be judged in more qualitative terms, such as I have described above. Moreover, the particular role of flow control can also be considered by assessing the unique incentives that it creates for recycling, as I do in the next section.

Reduction in waste generation

49. By charging tipping fees for non-recyclable waste that support all waste system components, and not charging fees for delivery of recyclables, the Counties' plan provides greater incentives not only for complying with recycling laws, but also for reductions in the generation of waste. Such reductions lead to many of the same public benefits as recycling. The heightened incentives presented by higher tipping fees for non-recyclable waste encourage residents, businesses, and haulers to find innovative ways to reduce the amount of waste that is generated. For example, higher

tipping fees have likely contributed to decisions by large waste generators in the Counties — including hotels, institutions, and industrial facilities — to seek out waste reduction, reuse and recycling opportunities, efforts that have been aided by the Authority.[39]

50. In like manner to his contention regarding the Counties' recycling rates, Dr. Berkman's suggestion that the Authority has been unsuccessful in encouraging reductions in waste generation is based on a misleading comparison of New York State planning units' per capita waste levels.[40] Because it relies on data from the same source, the comparison is flawed for the very same reasons I have described above for Dr. Berkman's comparison of recycling rates.[41]

Household hazardous waste

51. Through its household hazardous waste collection system, the Counties' waste management plan has excelled in promoting the local environmental benefits arising from the reduced likelihood that individuals will improperly dispose of hazardous waste. While there are clear environmental benefits associated with proper disposal of hazardous wastes, individuals making the disposal decisions may only directly enjoy, and thereby consider, some of those benefits. Environmental benefits may also be enjoyed by others. For example, a neighbor may have a reduced risk of well water contamination if an individual properly disposes of a hazardous liquid rather than pouring it down the drain. Moreover, in many communities, hazardous waste collection

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[39] Utica Metal Products informed me that the higher tipping fees have played a large role in motivating its waste reduction and recycling efforts.

[40] *See* Expert Report of Mark Berkman, November 15, 2002. Exhibit 9.

[41] In this case, not only are the exhibit's data incomparable, but in at least one case they are also incorrect. Dr. Berkman reports that Franklin County has the lowest per-capita waste generation. Yet, the population he reports for that county, 216,000, while consistent with the New York State DEC report he cites, is overstated by a factor of 4 according to the U.S. Census, which estimates its population at 51,134 in 2000.

opportunities are infrequent, making it more difficult — and hence costly — for individuals to properly dispose of hazardous waste. Together, these factors indicate that individuals may not properly dispose of hazardous wastes to the degree and in the manner that is socially desirable. The Authority has continually made strides to reduce the difficulty of proper disposal, including expanding its collection operation to six days per week in 2001. In addition to this household hazardous waste program, the waste audits of businesses and institutions — conducted by the Authority, and likely encouraged by the heightened incentives for waste reduction and recycling — provide a valuable opportunity for the identification of hazardous waste and development of appropriate disposal methods.

Human health, the environment, and environmental liability

52. The Counties' waste management plan also increases protection of human health and the environment through its control of the means and location of disposal for the Counties' non-recyclable waste. There are three reasons why the Counties' plan adds to such protection, in light of existing state and federal regulations. First, while federal regulations offer a significant level of protection, they by no means offer complete protection. Second, the stringency of state regulations varies.[42] Finally, the enforcement capacity of regulatory bodies and compliance with regulations by disposal sites also varies. Consequently, disposal sites are clearly left with the opportunity to differentiate themselves based on their environmental impacts, and the Authority seeks to choose a disposal option for the Counties' non-

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[42] The Resource Conservation and Recovery Act (RCRA) specifically grants states and political subdivisions thereof the authority to impose waste management regulations that are more stringent than federal standards (Title 42, Chapter 82, Subchapter III, Sec. 6929, "Retention of State Authority").

recyclable waste that ensures maximum protection of human health and the environment.

53. It is important to note that this aspect of the Counties' waste management plan yields both environmental benefits and direct financial benefits to the Counties. The former benefits are clear. Not only do the Authority's environmental considerations reduce the likelihood that the Counties' waste may damage the environment, but, due to the volume of its waste, it creates a significant incentive for disposal sites to improve the environmental protections they have in place. The direct financial benefits arise from the reduced likelihood that the Counties' waste will contribute to what may one day become a contaminated site, an outcome that could impose financial liability on the Counties' waste generators. The defendants' counsel has informed me that, pursuant to federal and state environmental laws, if a landfill is determined to require remediation due to the presence of hazardous substances, with minor exceptions, any residential commercial, or industrial solid waste generator whose waste was delivered to that landfill may be held jointly and severally liable for the costs of investigation and remediation if their waste may have contained any of a broadly-defined set of hazardous substances.[43] This is the case regardless of whether or not they knew or controlled where the waste was taken and regardless of whose hazardous substances were the cause of the determination that remediation is required. As I mentioned above, prior to the implementation of the Counties' waste management plan, many of the Counties' businesses and institutions faced financial liability due to contamination at a local landfill.

54. In the process of choosing a contractor for disposal of the Counties' waste, the Authority has expended significant resources evaluating the environmental consequences of that

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[43] *See* Drabicki, J., 'Memorandum Re: Assumptions for Expert Report Regarding CERCLA Liability,' December 23, 2002.

choice.[44] It is unlikely that private waste haulers or waste generators would expend similar effort.[45,46]

55. Referring to an EPA report on flow control, Dr. Berkman contests the human health and environmental benefits of the Counties' waste management plan and Local Laws.[47] First, it is important to note that, in making this argument, Dr. Berkman draws from a portion of the EPA report that strictly addresses disposal of waste at landfills or incinerators.[48] Aside from its impact on the final disposal of the Counties' non-recyclable waste, the Authority's plan offers protection of human health and the environment through, among other programs, its household hazardous waste collection. Second,

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[44] Authority has informed me that prior to awarding its first disposal contract in 1991 to a Pennsylvania landfill, the Authority directed its consulting engineers and geologists to conduct a site investigation and to review the landfill's environmental impact statement and permit documents. In addition, Authority staff met with the Pennsylvania Department of Environmental Protection prior to awarding the contract. *See* 'Memorandum Re: Environmental Review and Pennsylvania Solid Waste Management Regulations,' Oneida-Herkimer Solid Waste Management Authority, December 21, 2002.

[45] This was confirmed in at least one deposition of a plaintiff. *See* Examination Before Trial of Kenneth Wittman and Joan Wittman, Plaintiffs, Taken By The Defendants, Pursuant To Notice, United States District Court Northern District of New York, December 10, 2002.

[46] Even if the Authority's efforts to gather information on the environmental impacts of its disposal site may be beneficial on the whole for the counties' waste generators, the same generators would not be expected to seek that information on their own. While this information may be costly to gather, once gathered, its benefits can be shared with all waste generators without cost. Therefore, while for each generator the benefits of gathering this information may not outweigh the cost of doing so, the benefits enjoyed by all the Counties' waste generators may far outweigh the cost to the Authority of collecting and sharing the information. Put simply in terms of conventional economics, public goods tend to be under-provided by ordinary private markets.

[47] *See* Expert Report of Mark Berkman, November 15, 2002, page 22.

[48] *See* 'Flow Controls and Municipal Solid Waste,' Environmental Protection Agency Report to Congress, The Office of Solid Waste, Municipal and Industrial Solid Waste Division, March 1995, page II-5.

the EPA report to which Dr. Berkman refers specifically states that, "There is no evidence that flow control either positively or negatively impacts the statutorily assured level of environmental protection, because the underlying regulatory requirements are controlling."[49] Yet, the Local Laws do affect the degree of achievement of the statutorily specified level of environmental protection because compliance can vary across disposal sites. Moreover, the Local Laws allow the Counties' to seek disposal in states with more stringent statutes and to seek environmental protection levels beyond that which is statutorily specified.

56. Dr. Berkman's attempt to refute the benefits arising from the reduced potential for environmental liability is both irrelevant and misleading. Dr. Berkman does not seem to question the ability of a business, individual, or government to reduce the potential for environmental liability through actions such as those taken by the Authority. Instead, he focuses on whether government-run facilities have offered a reduced likelihood of environmental contamination, and resulting liability, relative to private facilities. In so doing, he points out that "a large percentage of municipal landfills that have become Superfund sites were publicly run."[50] Yet the relevance of this conclusion is unclear as the Authority's waste management plan has thus far relied on private landfills for disposal. It has focused on choosing a site that offers the least likelihood of creating a future environmental liability, regardless of whether it is publicly or privately run. Moreover, while Dr. Berkman brings attention to the number of publicly owned landfills that have become Superfund sites, he fails to point out that the very statistics he relies on

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[49] Ibid. page 11-5.

[50] *See* Expert Report of Mark Berkman, November 15, 2002. page 20.

indicate that a much greater percentage of private landfills became Superfund sites than did public landfills.[51]

V. ALTERNATIVES TO THE COUNTIES' FLOW CONTROL LAWS

57. Flow control is one element of the Counties' integrated solid waste management plan. Therefore, in evaluating alternatives to flow control, it is essential to consider the mechanisms by which it contributes to the benefits of the plan, and whether the same level of benefits can be achieved effectively through alternatives. There are five critical elements to consider:

- Flow control guarantees that all of the Counties' waste will be subject to the Authority's plan, including decisions about the appropriate disposal of non-recyclable waste, which is influenced by the Counties' commitment to protecting human health and the environment.
- Flow control creates financial incentives for waste reduction and recycling.
- Flow control facilitates enforcement of the waste management regulations and laws.

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[51] The statistics in Exhibit 7 of Dr. Berkman's expert report show that, throughout the United States, 30.7 percent of landfills on the Superfund National Priority List in 1990 were privately owned. Yet, historically private landfills represented an even smaller percentage of *all* landfills. While the percentage of all landfills that were privately owned grew during the past few decades, by 1984 it had only reached 17 percent. *See* Repa, E., 'Solid Waste Disposal Trends,' *Waste Age*, April 1, 2000. Therefore, the fact that 30.7 percent of landfills on the Superfund List were private suggests that privately owned landfills were disproportionately more likely to become Superfund sites than publicly owned landfills. If a public and private landfill were just as likely to become Superfund sites, then the share of all Superfund landfills that were private should match the share of all landfills operated prior to 1990 that were private. Dr. Berkman's exhibit shows that this is not the case.

- Flow control offers a unique means of financing the Authority's solid waste management programs.
- Flow control produces information that is valuable for other elements of the Authority's waste management plan.

58. Having the Authority take over collection of solid waste in the Counties would be one alternative that could likely achieve the same public benefits as flow control. Yet, this would impose an even greater burden on private commerce, since private haulers now collecting in the Counties would be displaced, and all waste collected by public employees or contractors would continue to be delivered to Authority facilities. Consequently, the burden it imposes on interstate commerce would be no less than that resulting from the existing Local Laws. As the *Pike* test requires consideration of alternatives that impose a lesser burden on interstate commerce, the discussion below focuses on whether other feasible alternatives exist.

59. By dictating the flow of the Counties' waste, the most direct benefit of flow control that cannot be achieved through alternatives is that it ensures that all of the Counties' waste is subject to the Counties' waste management plan. A significant aspect of this plan is the Authority's decision as to what disposal option for the Counties' non-recyclable waste achieves the best balance of cost considerations and the desire for protection of human health and the environment above and beyond that which can be assured by the state and federal regulations.

60. Flow control also makes possible financial incentives for waste reduction and recycling that are unachievable through other means. The price of disposing of recyclable material, relative to that of recycling it, affects individuals' incentives to recycle. Simply subsidizing recycling cannot create the same difference in relative prices that comes with also increasing the price of waste disposal. Yet, without flow

control, the recyclable/non-recyclable price differential present in the Counties could not be sustained because haulers would simply respond by bringing their waste to disposal sites with lower prices. Due to the difference between the price of recycling and of disposing of waste that results from the Counties' system charge, waste haulers have a greater incentive to ensure that their customers are properly separating recyclable material from their non-recyclable waste. In addition, the higher tipping fee for non-recyclables waste creates a greater incentive for individuals, businesses, and other entities to find ways to reduce, reuse, and recycle their waste.

61. The Authority's capacity to enforce the Counties' waste management laws is a significant determinant of the incentive facing waste generators and haulers to comply with them. By ensuring that all of the Counties' non-recyclable waste is brought to the Authority's facilities, flow control significantly increases the ability of the Authority to enforce the laws. As a result, flow control likely increases recycling, composting, and appropriate hazardous waste disposal. Were haulers able to bring their waste to any disposal site, an equal level of enforcement would be much more costly — if not impossible — to achieve. Indeed, the negative impact on the Authority's enforcement capabilities posed by haulers disposing of waste outside the Authority's system was highlighted in testimony at an Authority hearing regarding haulers that violated the recycling laws.[52] An examination of penalties levied by the Authority since 1993 indicates that the Authority used the enhanced enforcement ability that is made possible by flow control.[53] Moreover, the fact that penalties

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[52] *See* Hearing of Oneida-Herkimer Solid Waste Management Authority Board Regarding Violations of the Local Solid Waste Management Laws by Waste Systems International and Waste Stream, September 27, 1999, pages 10-23.

[53] The Authority has levied more than $100,000 in fines since 1993 for the disposal of waste that includes too great a percentage of recyclable

have declined in recent years may indicate that compliance by haulers has consequently been improving. Dr. Berkman's suggestion that the Authority's recycling goals could be achieved by regulation alone does not take into account the role of enforcement in determining the level of compliance with such regulations.

62. In his expert report, Dr. Berkman also states that "The EPA ... found that flow control was not necessary to meet [waste reduction and recycling] priorities."[54] To support this claim, he draws from language in the EPA report on flow control, which states that "there are no data showing that flow controls are essential ... for the long term achievement of State and local goals for source reduction, reuse and recycling."[55] Yet, based on my reading of the EPA report, Dr. Berkman's interpretation of the EPA's finding fails to take into account the means by which EPA reached its conclusion, and thus its potential applicability to Oneida and Herkimer Counties. EPA's conclusion stems from its finding that few municipalities were using flow control to meet their recycling goals. In other words, the logic behind EPA's conclusion is essentially the following: relatively few municipalities are relying on flow control to meet their recycling goals, hence flow controls must not be essential for them to meet their goals. Such a conclusion cannot be used to comment on whether two particular counties with very aggressive recycling goals can reach those goals in the absence of flow control. Indeed, EPA carefully states "The Agency recognizes that local circumstances (affecting the need for flow controls) may differ substantially from the

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material. *See* 'Penalties Charged on Loads of Solid Waste Containing Recyclables,' Oneida-Herkimer Solid Waste Management Authority, 2002.

[54] *See* Expert Report of Mark Berkman November 15, 2002. page 21.

[55] *See* 'Flow Controls and Municipal Solid Waste,' Environmental Protection Agency Report to Congress, The Office of Solid Waste, Municipal and Industrial Solid Waste Division, March 1995. page ES-6.

national perspective."[56] In summary, flow control makes significant contributions to the achievement of recycling and waste reduction that cannot be made by alternatives that allow haulers to dispose of waste at any facility.

63. Flow control also offers a unique means of financing the Authority's programs. Political and organizational considerations may make it desirable for the Authority to be a financially self-sufficient system with a direct funding source, as opposed to relying on annual appropriations from general tax revenues. Moreover, an important consideration in any decision regarding public financing is equity. Of course, a determination of whether a public financing mechanism establishes an equitable means of collecting funds requires a definition of equity, something on which there is not common agreement. Therefore, I will defer to the definition of equity chosen by the Counties in the context of funding its waste management system: having waste generators fund the system in proportion to the amount of non-recyclable waste they generate.[57] I am unaware of any feasible alternative that offers such equity in funding. The only other means of guaranteeing this equity in funding would be to tax non-recyclable waste generation or waste collection in the town on a per-ton basis. Not only would neither of these alternatives be administratively feasible, the defendants' counsel has informed me that neither the Authority nor the Counties have the legal ability to levy such taxes.

64. By bringing the processing of waste into the public sector under the same Authority that oversees other parts of the integrated waste management system, flow control makes available to those other parts of the system better and more timely information regarding waste generation and the processing and disposal market. This information can then be

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[56] Ibid. page ES-2.

[57] *See* Affidavit in Opposition of Robert Julian, July 5, 1995. page 33.

used to improve those other parts of the waste management system. For example, better knowledge of the waste stream can improve decisions about future recycling efforts or improve the Authority's ability to consult with local entities on their internal waste management practices.[58] This information might be gathered through alternative means, such as surveys of collectors and waste generators, but these alternatives are unlikely to produce information of similar quality.

VI. CONCLUSIONS

Burdens on interstate commerce

65. The Counties' Local Laws, as currently implemented, *do not place a qualitatively or quantitatively greater burden on out-of-state interests*, relative to similarly situated instate interests. Indeed, there is reason to believe the Counties' waste management plan and associated flow control may have *increased* interstate commerce in waste disposal relative to what would have occurred in their absence. Flow control results in the delivery of all of the Counties' non-recyclable waste to two transfer facilities, which lowers the cost of subsequent long-distance transportation, and thereby makes interstate shipment of waste an *attractive* option. There is no reason to believe that interstate shipments would be more attractive in the absence of the Local Laws.

The proposed landfill

66. If the Authority does build a public landfill, this will have the effect of reducing private commerce in general. There is

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[58] The Authority has informed me that the composition of waste disposed of at the Authority's transfer stations has contributed to decisions to begin recycling numerous materials, including junk mail, pizza boxes, and cereal boxes. *See* 'Oneida-Herkimer Solid Waste Authority System Improvement Schedule,' Oneida-Herkimer Solid Waste Management Authority, April 2001.; 'Items Recycled by Oneida-Herkimer Solid Waste Authority and Which May Not Be Recycled By Other Counties,' Oneida-Herkimer Solid Waste Management Authority, 2002.

nothing in the nature of such a reduction in private commerce that would disproportionately burden interstate commerce relative to in-state commerce. Under current conditions, it is likely that the impact of such a reduction in private commerce will fall most heavily on in-state interests. Less than one percent of the waste exported from New York State in 2000 originated in upstate New York. Also, the Counties' waste is currently being shipped to an in-state facility, indicating that in-state facilities would likely be used by private haulers were flow control removed.

Implication of widespread adoption of flow control and extraterritorial economic effects

67. The widespread adoption of flow control, as it is currently implemented by the Authority, would almost certainly increase interstate commerce. This is because, in some cases, municipal transfer facilities would be built in regions where private firms would not have adequate incentives to build such facilities, thereby lowering the cost of interstate shipments. Even if the widespread adoption of flow control were to be accompanied by significant increases in public landfills, demand for disposal in the private waste disposal marketplace would decline, affecting in-state and interstate private commerce alike. Given that just ten percent of municipal solid waste in the United States enters interstate trade, the absolute impact on in-state commerce would be far greater than that on interstate commerce. Finally, there is no evidence to suggest that the flow control laws, limited in application to waste generated within the jurisdiction adopting them, place *any extraterritorial* burden on interstate commerce. In fact, were flow control to be widely adopted and involve the construction of numerous public landfills, the resulting reduction in demand for disposal in the private marketplace would reduce the cost of disposal both for those municipalities that adopt flow control but continue to rely on that private-sector marketplace, as well as for private interests in jurisdictions that do not adopt flow control.

Public benefits

68. The citizens of Oneida and Herkimer Counties have enjoyed the benefits of safe and reliable solid waste management since the adoption of the Local Laws. The integrated waste management system established by the Authority has handled all waste delivered to it since it was established, and has instituted and maintained successful recycling, composting, and household hazardous waste programs, all of which benefit the public and are consistent with state waste management policy. The system has been enhanced and supported by a system charge on non-recyclable waste which equitably distributes the cost of the system on the basis of disposal of non-recyclable waste.

69. An economic assessment indicates that the objectives sought by the Counties' waste management plan are indeed legitimate public benefits. In particular, many of the objectives involve promoting actions that yield public benefits in excess of the benefits directly enjoyed by those undertaking the actions. Therefore, in the absence of government intervention, those actions are unlikely to be undertaken to the degree that is optimal from a societal perspective. While it is difficult to measure definitively the degree to which the Counties' waste management plan — and flow control in particular — is responsible for the achievement of these objectives, available evidence indicates that the Counties' have been successful in achieving their social objectives, and that flow control has played an important role.

Alternatives to flow control

70. Through a number of mechanisms, flow control has a unique capacity to enhance the achievement of public benefits. Flow control makes it possible to ensure that the disposal of all the Counties' non-recyclable waste is conducted in accordance with the Counties' desired levels of human health and environmental protection, which may

exceed that specified by state and federal regulations. By making greater price incentives possible and substantially reducing the cost of enforcement, flow control promotes increased recycling and waste reduction. Flow control also enhances the quality of information available to the Authority as it seeks to achieve the Counties' objectives related to solid waste management. Finally, flow control offers the only available means of achieving equity, as defined by the Counties, in financing the Counties' solid waste management responsibilities. I cannot conceive of any feasible alternatives that would offer the same level of public benefits.

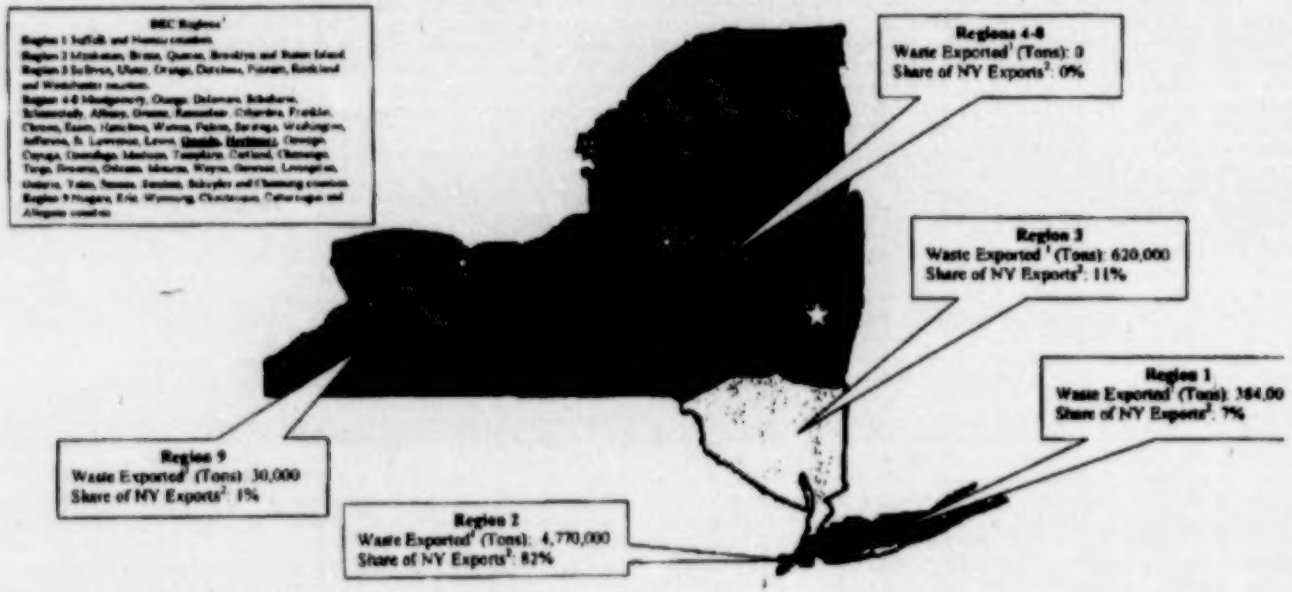
The foregoing constitutes my opinion with respect to the questions presented to me in this matter.

January 10, 2003

/s/ Robert N. Stavins
Robert N. Stavins

EXHIBIT 1

Waste Exported from New York State, By Department of Environmental Conservation (DEC) Region[1]



Notes
1 Waste Exported: Waste generated in the region that was shipped out of state in 2000.[1]
2 Share of NY Exports (in %): Waste exported in the region as a percent of total waste exported from New York State in 2000.[1]

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[APPENDIX A – CV OF ROBERT STAVINS
OMITTED IN PRINTING]

APPENDIX B
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APPENDIX C

A careful examination of the incentives that influence the decision to build a transfer station suggest that, because it faces different incentives, the Oneida-Herkimer Solid Waste Management Authority may have established transfer stations and begun interstate waste shipments before it was economically attractive for private haulers to do so. This would have the effect of lowering the cost of long-distance waste transportation — and thereby increasing likelihood of interstate commerce — earlier than would have been the case in the absence of the Local Laws. Even if the specific circumstances in Oneida and Herkimer Counties imply that private haulers would have built transfer stations as early as the Authority did despite the Authority having greater incentives to do so, the greater incentives facing public authorities may accelerate the construction of transfer stations in other communities adopting the Counties' waste management approach. Therefore, the discussion below has relevance in evaluating what would happen if the Counties' waste management approach were adopted widely.

In the absence of flow control, a private haulers' decision to build a transfer station would depend on whether such an action would minimize the combined cost of transporting and disposing of its waste.[1] Prior to building a transfer station, a hauler faces transportation costs that increase by a particular amount with each additional mile traveled to a disposal site (Line C_{NTS} in Figure 1 of this, Appendix). A transfer station offers lower per-mile costs of shipping waste, that is, the slope of Line C_{TS} is less than the slope of Line C_{NTS}. Yet, regardless of how far waste is shipped, transfer stations involve significant capital expenditures and fixed costs

[1] While transfer stations could be built by firms other than those that collected waste, the same conditions would have to be met for such an operation to provide services profitably to local collectors.

necessary for their construction and operation (Amount FC in Figure 1, hereafter referred to as "fixed costs").[2]

As shown in Figure 1, if a hauler is going to ship waste sufficiently long distances, it may be less costly to build and use a transfer station, even after taking into account the cost of building and operating it. That is, beyond distance M*, Line C_{TS} is lower than Line C_{NTS}. Beyond that distance, the per-mile savings offered by a transfer station will allow the hauler to fully recoup the fixed costs of the station. In like manner, for distances less than M*, the total transportation costs are lower if the hauler does not build the transfer station. Up to M*, the distance is not sufficient for the per-mile savings offered by a transfer station to offset its fixed costs.

When faced with the opportunity to dispose of waste locally, a hauler would only ship waste to a distant site if that landfill offered savings in disposal fees, relative to the local site, that would be large enough to offset the total increase in transportation costs (Amount A_{PH} in Figure 1). It is essential to note that, because the hauler must be convinced of the merits of building and operating a transfer station — something s/he would not do if a local landfill were used — the amount of savings necessary to bring about long-distance waste shipment is affected by his/her need to recoup the cost of building and operating the transfer station (Amount FC in Figure 1). In particular, the savings in disposal fees must be sufficient to more than offset the additional transportation costs if the hauler already had a transfer station in place (Amount A_{PH} in Figure 1). The savings in disposal fees must also be sufficient to offset those fixed costs of the

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[2] The cost of having a collection truck deliver its waste to the transfer station at the end of its collection route, instead of beginning to drive towards the ultimate disposal site, can also be considered a part of the fixed costs of using a transfer station. This is a cost in that it involves time — and associated labor, fuel, and equipment costs — that could have been spent driving towards the ultimate disposal site.

transfer station that could not be recouped if the hauler disposed of waste locally (Amount A_{PH2} in Figure 1).[3] Only then would the hauler build a transfer station and ship waste to the distant site.

In contrast, with benefits from building a transfer station beyond that of minimizing the combined cost of transporting and disposing of non-recyclable waste, the Authority built transfer stations at a point in time when it might not have been profitable for local haulers to do so. Once the stations were built, in order to make disposal at distant sites attractive, the disposal fees at those sites only needed to offer savings relative to fees at local sites that were great enough to justify the additional transportation costs (Amount A_A in Figure 2). This amount is equivalent to A_{PH1} in Figure 1. Unlike in the case of a private hauler, since the fixed costs (Amount FC in Figure 1) would be incurred regardless of where the waste is shipped, those costs would not affect the amount of savings necessary to encourage the Authority to choose a distant disposal site. Consequently, once the Authority's transfer stations were in place, interstate shipments became attractive with a smaller difference in disposal fees between in-state and out-of-state sites than would have been necessary to make it profitable for private haulers to build transfer stations and engage in long-distance waste shipments. That is, amount A_A is less than amount A_{PH}.[4] Thus, there is an economic basis to believe that the

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[3] It is this portion of the fixed costs that would cause a hauler to decide against building a transfer station if s/he were delivering waste locally.

[4] Another factor that suggests the Authority may have established transfer stations earlier than the private sector would have is the fact that the decision to build a transfer station involves a significant, irreversible investment with an uncertain return. Even if, at the point in time that a transfer station could be built, distant landfills offer disposal fees that are low enough relative to local sites to suggest that a hauler could recoup the cost of building the transfer station, there would still be significant risks that a hauler would not be able to recoup all of those costs. Among other contributors to this risk are: the possibility that a low-cost local disposal

Local Laws, and the Authority's implementation of them, may have brought about interstate shipments of the Counties' waste sooner than would have occurred in the absence of those laws.

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option would become available in the future, and the potential that competition may keep the hauler from maintaining enough customers — and hence trash flow — to recoup the cost of building and operating the transfer station. This risk would reduce the hauler's incentive to build a transfer station.

Figure 1. Cost of transporting one ton of waste with and without a transfer station as a function of distance: Assuming transfer station's construction and use is dependent on disposal site chosen[1]

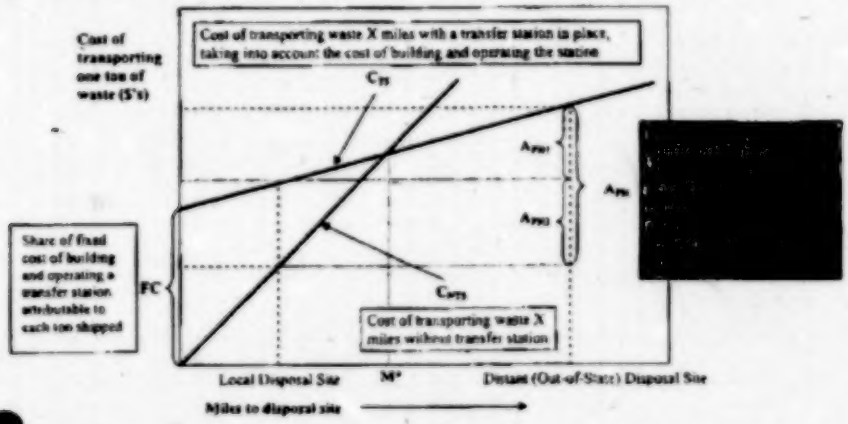
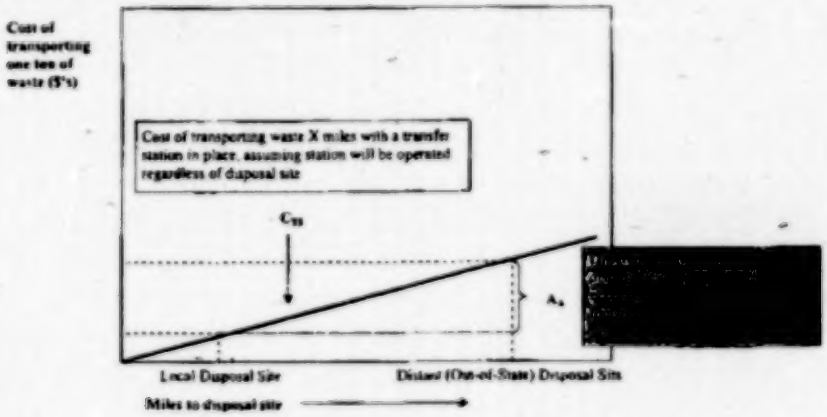


Figure 2. Cost of transporting one ton of waste as a function of distance: Assuming transfer station will be built and used regardless of distance that waste is shipped



[1] 'Waste Transfer Stations: A Manual for Decision-Making,' Environmental Protection Agency, 2002. <http://www.epa.gov/epaoswer/non-hw/muncpl/pubs/r02052.pdf>, visited January 4, 2003.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

Affidavit In Opposition to
Plaintiffs Motion for Summary Judgment

HANS G. ARNOLD, being duly sworn, deposes and says:

1. I am the Executive Director of the Oneida-Herkimer Solid Waste Management Authority (the Authority) and have held this position since the creation of the Authority in 1988. Before that I was Commissioner of the Oneida County Department of Solid Waste Management. Prior to that time, I worked on environmental management, planning, and solid waste issues in the Oneida County Planning Department. I am the immediate past president of and I remain an active member in the New York State Association For Solid Waste Management. I was appointed by the Governor to serve on the New York State Solid Waste Management Board. I make this affidavit in opposition to the plaintiffs motion for summary judgement.

2. The plaintiffs here seek to eliminate the ability of a community to make a public decision to establish a system that best serves their solid waste management needs and goals. They ask this Court to destroy that local option and replace it with a system that gives the hauler the exclusive right, without consultation with the waste generator or any community representative, to decide what, how, and where that generator's solid waste will be managed. They seek to strike down the ability of the public to exercise the right to establish a solid waste system that excludes, evenhandedly, private sector disposal services.

3. The local solid waste management laws were not used to "fund", "reimburse", or "finance". These local laws were enacted in response to public demand and to meet the public goals of the residents, industries and businesses of the two Counties. They represent a community's solution to a difficult problem; a solution based on clearly developed public policy goals; a solution employing a fair, organized and logical approach; and a solution put in place democratically through action by duly elected local elected officials.

Inherent Problems in Solid Waste

4. Solid waste is not an innocuous or inconvenient item. It is an obnoxious amalgam of discarded items, products and materials that singly and in combination will result in contamination of air, land and water and threaten public health if not properly managed. Residential and municipal waste streams contain materials like diapers, old paint, pesticides and chemicals, used motor oil, light bulbs, batteries, plastics, construction and demolition debris and other discarded products that may contain mercury, lead and other heavy metals. In the past, the improper management of these items either at unlined landfills or through roadside dumping or backyard burning, has resulted in severe environmental and public health problems.

5. In Oneida and Herkimer Counties, there is a long history of both private sector mismanagement of solid waste service and community efforts to rectify the situation. The Court is respectfully referred to the affidavits of Robert Julian and Michael Gapin for that history.

6. Today, the residents, businesses and industries of the region generate about 615 tons of solid waste every day of the year. There have been and continue to be three basic worries relative to solid waste management. First, the careless handling of solid waste results is an immediate threat to public health because of exposure to disease and vectors

for disease. Without proper collection, handling, processing and disposal, a public health crisis can arise and it is the public's representative, government, which must react and control the problem. The threat to public health can occur at every step in the process of handling solid waste, but importantly, it can and does occur right at the place it is generated, the home, if there is not a regular and reliable means for collection.

7. The second worry is the latent environmental and public health threat. Only in the past 25 years have we realized that improper management of solid waste will pollute groundwater and surface waters. The cost of cleaning groundwater contaminated by solid waste in the Oneida-Herkimer region alone is estimated at over $74 million.

8. The third concern is the mismanagement of finite natural resources. We have become a society producing an ever increasing volume of waste creating a regular and increasing demand for new disposal areas. Only an organized system of waste reduction and recycling can change that trend, promote wise use and conservation of resources, lessen our dependence on disposal, and slow our societal need for ever expanding disposal sites. The private market alone, and one element of the private sector (waste haulers), have not and will not provide such a system.

Public Response

9. The U.S. Congress and New York State Legislature addressed these issues with sweeping legislation to change the way we manage solid waste. (See Gapin Affidavit for a history of these policy initiatives.)

10. The public's recognition of solid waste problems continued and grew in the 1980's. The public was outraged when medical waste washed up on the shores of Long Island and New Jersey. Public cynicism soared when the now famous "garbage barge" MOBRO, relying purely on private

waste transporters, was turned away by disposal facilities along the entire east coast and the Gulf of Mexico.

11. Here in Oneida and Herkimer Counties local governments were jolted into the reality of state and federal laws that closed their old landfills and forced expensive clean-ups. Citizens were sent the bill to clean up a problem they thought they had left at their curb years ago. They never expected it to return.

12. The most publicized example of a local landfill engendering extended liability to broad sections of the public involved the Ludlow Landfill, which was placed on the National Priority List due to PCB and other contamination of groundwater and an adjacent wetland. The owner of the landfill and the generator of the waste oil containing PCB's brought a legal action against over 600 third parties forcing them to pay for the clean-up of the landfill and adjacent groundwater. School districts, dress shops, restaurants, villages, waste haulers, and many others were sued under CERCLA for the remediation costs even though the waste they sent to Ludlow was household-type garbage, and not oils containing PCB's. (See affidavit of Robert Julian for additional detail).

Local Government Response

13. Although there was a recognition of the need to reduce and recycle more waste as early as 1970, the expense of a separation program and the intrinsically cyclical nature of markets for recyclables were barriers to any meaningful levels of recycling. In the mid 1980's, local towns and villages were unwilling to make the capital investment in recycling in the face of widely fluctuating markets for recyclables. The local governments looked for a regional approach to recycling. Private collection and disposal practices at that time yielded no benefit for waste reduction and recycling. The more waste that was generated, the greater the revenue for disposal at the private landfill.

14. Based on a clear and continuing message from the general public, environmental groups and many others in our area, the Oneida and Herkimer County Legislatures took action to establish a public solid waste management system that would make recycling and waste reduction the top priority. Early in 1988 a local solid waste management and recycling law was advanced for public comment. The laws (see Julian affidavit) made the strongest possible statements of public policy:

- Protect the environment
- Reduce the waste stream
- Recycle everything feasible
- Stop illegal disposal
- Manage waste by its components through an exclusive public integrated system.

Creation of the Authority

15. The Counties created the foundation of the solid waste management system for the region, based on extensive public input, with the approval of the local solid waste management laws in 1988. The public through their duly elected representatives, had decided that it was fair and necessary that there should be a public system for the processing and disposal of solid waste generated by the area's residents, businesses and industries. It was clear to the public and to their elected representatives, that this function could not be left exclusively to the private sector. The horror story of exclusively private control had been played out here in the 1960's, 1970's and 1980's and the region had suffered environmentally and financially because of it (see Julian affidavit).

16. After considering many alternatives for moving forward with the public system, the Counties elected to ask the state to authorize the creation of a public benefit

corporation. Upon its creation in 1988 the Authority was empowered and designated to be the exclusive entity to plan and develop a public solid waste management system and to implement a public waste disposal monopoly over unrecycled and recyclable solid waste.

Development of An Integrated System

17. The Authority was created as the public administrative entity to develop and implement the policies of the counties. It is engaged in no activities other than those directly relevant to the fulfillment of its purposes.

18. The Authority developed a Local Solid Waste Management Plan in 1991, consistant with the series of New York State Solid Waste Management Plans, that established how we would proceed to accomplish the public policies adopted by the Counties. The approved plan describes the framework we established and continue to follow:

> The overall goal of the Oneida-Herkimer Solid Waste Management Authority is to provide for maximum levels of waste reduction and recycling, coupled with the development of environmentally and economically sound programs and facilities for the remainder of the waste stream. It is the intention of the Authority to continue to increase reduction and recycling programs and to plan all facilities to reflect these maximum feasible recovery levels.
>
> (FLSWMP, 5/91, p. 4)
> (See Exhibit A-1)

19. The Authority charted a course consistent with the broad base of public input received over many years and with public policies as adopted by the County Legislatures in the local solid waste management laws.

20. The approach, legislatively determined by the Counties, is one that could not be done without public assumption of the responsibility to provide waste disposal

service. But, at the same time, the Authority has sought to meet the public policy goals by combining and integrating the private and public sectors within the system.

Waste Reduction & Recycling

21. I had been completely involved, first as an environmental planner and then as the Commissioner of the Oneida County Solid Waste Department, with the very public process leading up to the creation of the Authority. I hold a keen understanding of what the public said throughout the process, which spanned most of the 1980's. If reduced to one word it would have been – RECYCLE!!

22. When the Authority was formed we began some pilot recycling and set up rudimentary programs to collect newspaper and glass. At every public forum I attended and in all the calls to our office, the public's message was clear – RECYCLE MORE!!

23. Oneida County had funded and started the construction of a regional materials recovery facility, now identified as the Oneida-Herkimer Recycling Center. The Authority agreed to take over the construction of the facility and to purchase it.

24. The design of the Recycling Center and the development of the recycling program were carefully integrated, at all times making sure that the recycling system would fully meet the Counties' public policies as set forth by the legislatures.

25. The Authority set out basic parameters for the recycling system:

- Make the separation program for residents user friendly – easy to understand and convenient.
- Establish as many recycling opportunities as possible. Recycle not only the easy, high revenue

items but also the lower value items that might initially be more expensive to process.

- Expand recycling opportunities whenever markets permit, even if it is a marginal market.
- Provide ample public education and information through schools, civic clubs and traditional media.
- Create incentives, financial if possible, to promote recycling.
- Make the Recycling Center able to serve the community for the long-term and make it adaptable to new recycling opportunities.
- Produce high quality processed recyclables so that market, security can be enhanced.

26. Public information and education began well before the Recycling Center opened to alert the public to the new opportunities they had been looking forward to. Since 1989, approximately $1,094,900 has been spent by the Authority on public information and education.

27. The Recycling Center opened in February 1991 and was characterized locally as marking the beginning of a new era in environmental management in Central New York. Over 4,000 people attended the grand opening, and since then over 11,000 people (mostly school classes) have toured their public Recycling Center.

28. Since opening in 1991 new recycling opportunities have been added and now residents of Oneida and Herkimer Counties have the opportunity to recycle all of the following through the Authority system (See Exhibit A-2):

Newspapers & Inserts
Magazines & catalogues
Phone Books
Brown Grocery Bags & Kraft Paper
Junk Mail
Automobile Batteries
Used Motor Oil
Used Motor Oil Filters
Household Paint
Used Antifreeze

Corrugated Cardboard
Lightweight Cardboard (i.e. cereal boxes)
Computer Paper
Glass
Plastics
Beverage Cartons & Drink Boxes
Metal Cans
Aerosol Cans
Foil Wrap & Foil Plates
Yard & Garden Waste
Brush
Swimming Pool Liners

29. The Oneida-Herkimer system is regarded as one of the most aggressive and expansive recycling programs in the Country. In addition to all the households in the region, approximately 200 businesses and industries use the facility. Since opening, over 133,000 tons of material has been processed for delivery to mills which manufacture new products. The Authority has contracts with 38 local and interstate buyers for these materials.

30. Prior to the public Oneida-Herkimer system, none of this material was recycled by the private sector and no funds were expended to educate and change the waste disposal habits of the public prior to the opening of the Center in 1991.

31. The early and major involvement in recycling allowed the Authority to establish a strong business relationship with mills and other buyers. This was recently confirmed in a 6/30/95 letter from CANUSA, a major international paper recycling company. The quality of the material sent by the Authority has been commended by the mills and the regular supply by Oneida-Herkimer and other municipalities has been the basis for new investment by the mills. This in turn has contributed significantly to higher prices for recyclables, particularly paper products. One of the original objectives of recycling - increase the reliable supply to spur expanded use of recyclables - has already been recognized for some recyclables. (See Exhibit A-3.)

32. However, the increase in a reliable supply must be sustained, even where financial loss is required, not only to fortify the market, but to maintain waste reduction goals. The objective of waste reduction through recycling may often conflict with market conditions, requiring the Authority to take steps which the private sector would not and could not take.

33. If left solely to the private sector, only the most profitable items would be recycled. If the market dropped, private firms would discontinue recycling that item. In 1987 - 1989 when the early public recycling programs were being shaped and when a comprehensive, community-wide recycling system was being considered, the private sector was discouraging recycling and charging for newspaper (See Exhibit A-4). The Authority's planning mandate required the opposite response – to continue accepting material without charge. The Authority's objective was to build a larger market and maintain public confidence through a stable, continuous program that is not subject to the expected wide swings of private markets.

34. The public does not want to be jerked in and out of recycling at the whim of private recyclers. Only with public involvement can the public policy of a comprehensive, continuous, dependable, and long-range recycling program be accomplished. Recycling markets change significantly. (See Exhibit A-5). As the graph shows, the plaintiffs now seek to declare that they are in the recycling and disposal business at exactly the point in time, and only at this point in time, when recycling markets are soaring and disposal fees are low. Experience has proven, even with the plaintiffs in this case, that collection firms will extricate themselves from "recycling and disposal" as soon as recycling markets fall and disposal fees rise. There is and can be no long-term private commitment to recycling and waste reduction in the absence of profitability.

35. As a public enterprise, the Authority takes all recyclables not just the ones with a low processing cost and high sales value. The Authority processes as many items as markets can be secured to continue to reduce the region's dependence on landfill disposal. Some items, such as green glass, #6 plastics, and lightweight cardboard (boxboard) have a significantly higher net processing cost than do newspaper and cardboard, in today's market conditions. The intent of the Authority is to provide a convenient, clearly stated recycling program with the continuity to be sustained over the long run.

36. Each year since the start of the recycling program there have been significant increases in opportunities and in the amount of material recycled. This remarkable trend reflects the community's eagerness for this program. This community has embraced recycling and they still ask for more opportunities. (See Exhibit A-6).

37. If we were to calculate the avoided cost of the Oneida-Herkimer recycling system over the last four years, using a conservative avoided disposal cost of $56 per ton, (ie. the price which would have been paid if 133,000 tons of recycled material had been landfilled instead) the value would exceed $14,000,000. By adding that figure to the actual receipts for sale of processed recyclables to mills, the value would exceed $19,000,000. The value of our community recycling program is immense in monetary terms and the long-term benefits for the community are even greater.

38. This system has reduced the burden on disposal - but it wasn't being done by the private sector or the haulers before the County legislators made the commitment. Private recycling in 1990 was minimal.

39. The Authority did not limit its recycling program to traditional materials, and it has sought every opportunity on the public's behalf. Brush, grass clippings and leaves, all of

which were being landfilled, can now be recycled. The private sector made no effort to manage this material and get it out of landfills. In 1991 the Authority permitted and constructed a nine-acre engineered pad to receive and process mixed green waste. There is no requirement that generators deliver green waste to the Authority facility, but over 40,000 tons of material from about 220,000 residents has been received and processed since 1991. The material is ground and windrowed to produce a stable humus. By taking this proactive step the Authority created a local market and now topsoil and landscape companies are competitively bidding to buy the humus product from the Authority. This is another example of a step taken to carry out the public policies of the counties.

40. The Green Waste Compost program, however, requires subsidy. Nevertheless, markets are being created and the Authority is reducing dependence on landfills significantly. This program is subsidized with fees collected from disposal of non-recyclable solid waste. It is an example of waste reduction achievable only through an integrated approach to management of the larger waste stream. It is a by-product of exclusive public responsibility for waste disposal.

41. As Program Manager for the Oneida County Environmental Management Council, I organized Oneida County's first household hazardous waste collection in 1983. It was the second in the state and the third such program in the nation. At that first event we collected 18 drums, mainly of pesticides, at a cost of $1,600. When the Authority was formed we organized similar events in 1989 and 1990. These one-day programs drew 1,098 and 1,271 people, collected 420 and 557 drums, and cost $165,000 and $225,000 respectively.

42. The Authority responded to this strong public demand and constructed a permanent, permitted Household

Hazardous Waste Management Facility. Now, service is given to more households, about 3,500 a year, at a lower cost, about $150,000 annually. The facility provides a weekly opportunity during six months of the year for individuals to dispose of pesticides, herbicides, oils, paints, solvents, photographic supplies and other household chemicals in the most environmentally sound manner. Of the 11,000 gallons received in 1994, 3,000 gallons were recycled and the balance was specially packaged for transport and disposal at licensed hazardous waste facilities outside the region. The public overwhelmingly supports this program.

43. No fees are charged to residents for drop-off of hazardous products. The cost is absorbed by the system because the benefit inures to the community in the reduction of toxicity of their landfilled waste. No similar private sector program is possible, but the program is possible for the Authority under the integrated system.

44. The Authority supports and expands the recycling program through a public information and education program. A recycling curriculum was developed by the Authority in 1992 and given to every elementary teacher in the region. Instructional posters on recycling (multi-lingual) have been mailed to every household in 1991 when the Recycling Center opened and in 1992, 1994, and 1995 when new recycling opportunities for plastics, dry food boxes, junk mail, and gable top boxes were added. Green waste composting posters are regularly provided through area home and garden stores. A "Just Mow It" program was developed to reduce green waste generation. A regular newsletter is published and the Authority is assisting local industries in establishing a computer bulletin board for recycling and regulatory updates. In addition, traditional advertisements including television commercials, billboards and block ads in the local media provide instruction and reminders to area businesses. Over 270 waste "audits" have been done for local

industries, at their request, to improve reduction and recycling and help reduce their waste disposal expenses.

45. If left solely to the waste haulers, or private sector in general, none of these programs would be implemented. Unless there is a tangible, short-term economic benefit, these types of programs have not been and will not be done privately. The public requires a regular reliable and full-service system that does not shrink or stop because the profit margin is too small. This is what the Oneida-Herkimer system provides.

Long-Term Environmental Security

> The most significant policy developed by the Authority, based upon consideration of public comment and all available information, is that the volume of waste sent to a landfill should be as small as possible. There is a growing body of evidence which indicates that modern landfills store, rather than dispose of, waste. Therefore, each unit of waste placed in a landfill triggers a long (perpetual) process of facility maintenance, monitoring, and possibly remediation. This is reflected in the Part 360 Regulations which require a minimum 30 year post closure plan.
>
> FLSWMP, 5/91, p. 82
> (see Exhibit A-1)

46. As set forth in Julian affidavit, the issue of long-term environmental security is of critical importance to all waste generators including every household, business, industry, and institution in the Counties. It is therefore critical that extreme care be taken in all aspects of waste management to insure that waste is only sent to facilities with the best environmental protection systems and with proven management experience. If this level of care is not taken, the public could be exposed to the kind of massive financial

liability that happened with the Ludlow Landfill, but on a multiple site basis.

47. The Authority employs a system of monitoring, inspection and checking of all wastes delivered that helps to minimize this risk and give certainty and security to the public.

48. The plaintiffs' own submission in this case demonstrates that they will not follow even the most rudimentary rules of environmental safety.

49. Jeff Bliss, in his supporting affidavit, states that he uses "Bill Frank in Youngstown, Ohio, for disposal of C & D debris". According to Mary Helen Smith, Mahoning County Solid Waste Program, there is no Bill Frank, Inc. facility in Youngstown, Ohio. Bill Frank is a Pittsburgh waste broker arranging disposal deals at many landfills in Ohio. Some of the solid waste brokered by Bill Frank is disposed of at American Landfill in Mahoning County which is unlined. C & D material is sent to LAS Landfill which is also unlined. Based on Ms. Smith's records. Bliss Disposal is not registered in Ohio as a transporter.

50. Discovery in this case will reveal whether Bliss or any other plaintiff informs customers of the ultimate destination of their waste, or purports to assume any obligation to indemnify customers from liability arising from improper disposal by Bliss, subsequent brokers, or any other entity in the subsequent chain of handling and possession.

51. Public disposal by contrast both informs citizens of the destination of their waste and assumes collective responsibility for potential future liability. Avoidance of those risks is the focal point and avowed purpose of the public system.

52. The Authority has taken steps for the short and long-term to make sure that the public's exposure to environmental liability is controlled and minimized. For

waste material that cannot be recycled the Authority operates one local and two regional transfer stations. The local station serves the Town of Webb. The two regional, stations provide the means to receive, inspect, and aggregate the waste for transport to Empire Sanitary Landfill - the facility which is contracted by the Authority, under strict standards set forth in public bidding documents, to receive waste until the landfill is developed locally to serve this region. Waste is inspected to first insure that no dangerous or hazardous materials are received. If they are, actions are taken immediately for the safe and legal disposition. Secondly, the inspection is to insure compliance with recycling requirements.

53. The community and specifically all waste generators benefit from the use of a single publicly selected facility for disposal. The Empire facility employs the best environmental protection systems available. Waste generators have their long-term environmental risk minimized because of these protections and because the Authority made a commitment as the responsible party should there be any legal action in the future.

54. The Authority also operates its own landfill. This double composite lined, New York State Part 360 compliant facility will reach capacity in the next 6-8 months and will be closed. For at least 30 years the Authority will monitor and maintain the landfill.

55. As part of the development of the local solid waste management plan, the Authority worked with the community to develop a method for siting a landfill locally to serve the region. Over 40 public hearings were held on the methodology before it was employed to identify potential sites. The list of potential sites (78) was examined and scored with priority attention on the top 10. Three of these sites were identified for further consideration and two of these were subjected to subsurface investigation.

56. In 1994 one site was designated to apply for permits and an environmental impact statement. In 1995 the principal property needed for the landfill was secured by the Authority. The landfill is an important component of the system to insure that the environment is protected to contain and minimize the long-term environmental liability, and to provide reliable, cost effective service. However, its size, cost and life are dependent on the success of the reduction and recycling programs of the system.

57. The system is designed to maximize recycling, minimize disposal and insure the highest levels of environmental protection over the long term. The system is designed and intended for the long-term. Siting, constructing and operating a safe and modern landfill is a component of that system. The costs of construction and operation of the landfill do not drive the system. Rather, the system determines the need, size and costs of the landfill.

Financial Fairness & Security

58. The Authority has reflected the community's goals in the structure of its financial management system as well. The Authority established this as an official policy in the approved Local Solid Waste Management Plan:

> "The Authority will continue to employ a rate structure which rewards and promotes reduction and recycling. The Authority will also expand education and other efforts to improve participation in recycling and increase recovery rates."
>
> FLSWMP, 5/91, p.4
> (see Exhibit A-1)

59. The Authority's system tipping fee is a user fee system where every entity that delivers non-recyclable waste to the system is charged on a weight basis. The cost of providing the system of services, based upon the waste generated within the two Counties, is $86 per ton for

municipal solid waste (msw) for 1995. This fee supports all the facilities and programs which have been and are being put in place to meet the community's goals through an integrated service system. The fee is not charged on recyclables. That decision was made to encourage as much recycling as possible.

60. Under system fee financing, waste generators have a direct economic incentive to minimize the amount of waste they discard. Major industries like Remington Arms have cut down on their solid waste expenses by reducing and recycling more. Their former CEO came to the Authority Board and said he was prompted into action by the County laws.

61. Other financial management structures were considered and could have been used. Simply relying on County real property taxes was considered and in fact it has been advocated by one of the plaintiff's legal representatives. But, paying for solid waste through real property taxes is inherently and grossly unfair. There is no relationship between the volume of waste one generates and the value of one's property. For example, there are many large waste generators in the Counties which are tax exempt:

- New York State Mid-State Corrections Facility (1,600 inmate prison) - generates about 1,500 tons of waste annually but pays no property taxes.
- Mohawk Valley Community College - generates about 1,400 tons of waste annually, but pays no property taxes.

62. Under a property tax revenue system, farmers, homeowners, small business owners, and some industries would be saddled with a disproportionate share of the cost of solid waste. Under a property tax revenue system there would be no incentive to reduce or recycle since no measure of waste generation could be used to reduce taxes. While the

plaintiffs seek the "easy" subsidy of taxes to lower tipping fees on non-recyclable waste, the result would simply produce a windfall benefit to large waste generators at the expense of the average citizen.

63. The private sector waste disposal business has not and will not provide the kind of incentives provided by the Oneida-Herkimer system. The incentive for private hauler and landfill operator is to maximize waste to the disposal site and to do so as quickly as possible. Although none of the plaintiffs are in the disposal business, they seek to dismantle the system so that they can dispose of waste at the lowest price without regard to long-term environmental considerations and without offering the extra effort and cost of recycling, green waste composting, household hazardous management, oil recycling, and long-term education.

64. When the plaintiffs say that they can dispose of waste more cheaply, they want the Court to compare a single item disposal cost with the cost of an integrated system that includes reduction programs, education, recycling, composting, household hazardous waste, long-term landfill siting and other services the public demands. No reasonable comparison is possible between two such disparate levels of service.

The Role of Waste Collectors/Haulers

65. As detailed in the Julian affidavit, the public solid waste management system in Oneida and Herkimer Counties was developed to meet a variety of objectives including reduction, recycling, environmental security, and financial equity. The public policy commitment to the system made by the two County Legislatures was based on years of extensive interaction with the public and observation of the private sanitation industry. The public wanted the County to take a lead and develop a safe integrated system for the long-term security of the community.

66. The integrated system of programs and facilities, including the financial structure, is a comprehensive whole, greater than the sum of its parts. It is a stark contrast to the plaintiffs present and proposed business activity, should they prevail in this case.

67. The plaintiffs are in the business of waste collection. The plaintiffs are not in the disposal business. None claim to own a waste disposal site. None claim to own a recycling center or any type of processing facility. None claim to operate a landfill. None claim to have a financial interest in a landfill, recycling center, or waste processing facility. The plaintiffs drive trucks to collect waste, and in some cases they bring it to a garage to aggregate larger quantities, and they drive the waste to various processing and disposal locations. They have not negotiated long-term contracts with landfills, other disposal sites, waste processing sites, recycling centers or other waste management facilities. They have not made commitments on behalf of a region of 316,000 people.

68. The plaintiffs would like to portray that they are in the disposal business – because the current disposal market has low tip fees. They would arbitrage the spread between local Authority fees and the cheapest rates on the interstate market, thereby pocketing, for the short run, a sizeable profit. But when tip fees were higher and landfill capacity was more scarce, the haulers, including at least two of the plaintiffs, demanded county action to build a landfill. (See Julian Affidavit).

69. The standard billing practice of the waste collection industry in Oneida-Herkimer Counties and elsewhere is to treat disposal costs as a pass through to customers and generators. Customers are billed the cost of collection - fuel, wages, insurance etc., plus the anticipated cost of disposal. Where, as here, disposal services are public, disposal costs are uniform for generators and haulers alike. Competition

among haulers for customers is not affected by disposal costs, and firms gain or lose business by virtue of the efficiency of the collection service. Where disposal is procured on the open market, disposal costs become an element of competition in the collection industry. When this happens the power to choose the means, location and standards of disposal shifts from the customer (and his government) to the hauler.

70. All haulers who collect waste in Oneida and Herkimer Counties play on a fair and even playing field. The plaintiffs make no complaint that the public provision of disposal service injures their collection activities. They have lost no customers under public disposal.

71. The named plaintiffs applied for and received permits from the Authority for each year since the system was started. The plaintiffs have been seriously delinquent in payment of bills to the Authority over the seven years in which the system has been in effect. In December, 1994 these plaintiffs applied for and received permits and thereby agreed to participate within the system and comply with the applicable rules and requirements (See Exhibit A-7). One plaintiff wrote a letter on 1/5/95 thanking the Authority for a time extension and saying she was "looking forward to continuing a good business relationship" (See Exhibit A-8). Immediately thereafter, she took waste to Seneca Meadows in breach of a municipal collection contract to go to the Oneida-Herkimer facilities. Moreover, plaintiffs began a series of Freedom of Information requests for documents in connection with the lawsuit over seven (7) months ago.

72. The plaintiffs are not typical of the other haulers who do business within Oneida and Herkimer Counties. In letters from other haulers the support for the Authority system is apparent. In these letters the haulers point to fairness and to the need for a public system like ours to make sure that the small-scale hauler can compete and thrive. (See Exhibit A-9)

73. The lead plaintiff does not represent any other haulers or the views of any other haulers. Since the litigation the Authority has received unsolicited copies of letters from six (6) haulers who have resigned from the United Haulers Association because of the litigation. (See Exhibit A-10).

74. To the extent that any plaintiffs are currently taking unauthorized waste to other disposal sites in New York and elsewhere, they are bypassing the Oneida-Herkimer system and cheating all those who are still operating by the standing rules.

75. Some of the important material facts, known to the plaintiffs, bearing upon the differences between public and private sector waste disposal and the accuracy of their claims include whether any of the plaintiffs have taken waste out of the Oneida-Herkimer system; whether disposal of such waste was at a fee lower than that charged by the Authority; if any of the plaintiffs have notified customers before or after such waste was taken to a facility outside the Oneida-Herkimer system; whether such plaintiffs have given or offered any reduced price or credit to the generators reflecting lower disposal fee; whether plaintiffs have notified the generators of applicable laws, regulations and specifically the County solid waste management laws; whether plaintiffs have disposed of large volumes of recyclables in landfills; whether plaintiffs have taken waste to unlined landfills and other non-compliant facilities; whether plaintiffs have taken waste to landfills partially or wholly located on land listed on the New York State Registry of Inactive Hazardous Waste Sites; whether plaintiffs have violated waste service contracts with public organizations; whether plaintiffs are in violation of legally binding affirmations they made in permit applications and agreements with the Authority; whether plaintiffs are in violation of state permits in which the plaintiffs committed to the participation in the Authority system and to deliver waste to specific Authority facilities. That information will demonstrate for the court the actual pattern and practice of

the collection industry in the Counties, and allow the court to justly weigh the purposes and benefits of the public system against the injury alleged by the plaintiffs.

Summary of Direct Impacts

76. If the Authority's monopoly on disposal is removed, the present operative criteria for selection of disposal methods – environmental security and compatibility with the broader goals of waste reduction – will be replaced by cost alone. Because environmental security adds cost to disposal, the lowest disposal costs will correlate with the least secure facilities. Generators however will be unable to make environmental determinations in an open market, because disposal prices offered by collection firms will be the dominant variable in combined service prices.

77. The power to choose disposal method and safeguards will pass to the hauler as a consequence of the introduction of low-cost disposal as the overriding market variable in collection industry consumer contracts. That variable is not now present in the collection industry. Authority tipping fees are constant and uniform for all collection firms – and all generators - only because the Authority monopolizes disposal service.

78. On the other hand, the Counties, through the Authority, have made long-term commitments on behalf of 316,000 residents and thousands of businesses, industries, and institutions. The Authority owns, operates and is developing an integrated system of facilities and programs, on the public's behalf. Public disposal is the only means to provide individual and small-scale generators with a voice in setting environmental standards for the facility which will receive their waste.

79. If the plaintiffs were to succeed in dismantling the Oneida-Herkimer integrated public system through this litigation it would cause immediate hardship to the defendant

and to the public and it would return solid waste management to a mode of operation that existed 20 years ago.

80. No solid waste planning would occur in the region. Waste would go to the cheapest disposal location a hauler could find with little regard for environmental soundness. Waste generators would be exposed to liability similar to the Ludlow situation. Upon a reduction of landfill capacity, users would be subjected to purely market driven supply and demand forces and pay premium disposal fees as a result. Their customers would pay the price. (See also Gapin affidavit).

81. Recycling would be restricted to only those items for which the private sector received sufficient profit. Continuity would evaporate as recyclable items would vary from month to month depending on the market. Participation in recycling would decrease because homeowners would become discouraged with the complexity of multiple private systems and with an ever-changing list of eligible recyclables. More recyclables would be disposed of with MSW and waste reduction would cease. Consequently, it would be impossible to meet state mandated reduction and recycling goals.

82. There would be no incentive for the development of new recycling markets. As local history has shown, the establishment of steady supplies of high grade material through price fluctuation spawn market development. Private sector recycling is purely reactionary. It deals in commodities where strong markets already exist and structures its market development accordingly. Private companies won't recycle material in a marginal or negative market.

83. Recycling and solid waste education would be terminated for lack of definition. Solid waste and recycling audits provided to institutions, businesses, schools and industries would cease. The promotion of alternate waste disposal options, if more costly than the cheapest market alternative, would be ineffective.

84. Yard waste composting would diminish significantly as municipalities could not collect the material and process it independently. It would instead be disposed of with MSW.

85. Household hazardous waste collection would cease to exist because there would be no funds to support it. This waste would end up back with MSW, thereby increasing its toxicity. The small quantity generator program would also cease to exist requiring these generators to find alternate disposal locations for this material.

86. The financial impact on the two counties would be great. The financial responsibility, including the bonded indebtedness already incurred for facilities and planning, would be remanded to the Counties to be supported by the property tax system. The user fee system, where each generator pays according to his particular level of waste generation, would be eliminated and with it all financial incentives to reduce and recycle.

87. This is a public system developed at the public's demand. This local public system is not considered in or reflected in the March 1995 EPA report offered by the plaintiffs in their effort to deny the necessity, purpose and utility of the Oneida and Herkimer local solid waste management laws. These laws, and the subsequent integrated system approach are essential to accomplishing the public goals developed over many years. The plaintiffs portrayal of the EPA Report is selective at best, and generally: inconsistent with the 25 years of federal legislation and regulation designed to protect the environment and human health. The EPA Report is indeed nationwide, but not comprehensive. The report states "The Agency recognizes that local circumstances may differ substantially from the national perspective." The plaintiffs motion for summary judgement is a request for a very quick legal decision, but the EPA Report clearly states "If a State or local government has relied on flow control to achieve certain ends, sudden

elimination of flow control may disrupt ongoing solid waste practices." The EPA Report also discusses that rationales for flow control go well beyond financing: Flow control ". . . enables them (local governments) to respond to State recycling goals and mandates." The EPA report, through its method of obtaining data, does not accurately identify the present situation in our region. Better information, more recent and specific to our region, exists regarding the effects of flow control. In March 1995, the NYSDEC released a Flow Control Report, and also in March 1995, the New York State Association for Solid Waste Management (NYSASWM) released a Flow Control Survey Summary. We are currently attempting to obtain copies of all information from the reports to counter plaintiffs allegations. A review of this information by the court, and a fair non-selective examination of the EPA Report, will lead to different conclusions than those presented by the plaintiffs.

88. This action by six haulers, and their motion for summary judgement is a race to get a decision adverse to the Counties and the Authority prior to Congressional action (See Exhibit A-11).

89. The Oneida-Herkimer Solid Waste Management system is not just a well intentioned effort by a few earnest public officials. It is a system built because the public asked for it. It includes a wide range of facilities and programs, based on reduction and recycling priorities, that are necessarily integrated from a management and financial perspective. The system the public wants could not be provided if left only to the private decision making of haulers. The people of Oneida and Herkimer Counties should continue to have the right to ask for services, to set up a system that fairly allocates the cost and which encourages the community goals they've established. The newspaper articles attached as Exhibit A-12 illustrate the public participation and support of the system.

90. The statements contained in this affidavit are true to the best of my personal knowledge and belief. Documentation for the statements contained herein exists in the files of the various municipalities of the Counties, in the records of the State of New York, can be confirmed and elaborated upon by expert testimony, or is known to the plaintiffs. A fuller presentation of the evidence contained herein was not possible, despite the efforts of the defendants, due to the shortness of time afforded since the filing of the Complaint and this motion. The following is a partial list of reports, laws, regulations, and documents which serve as the basis of this affidavit.

1. New York State Solid Waste Management Act, 1988.
2. Resource Conservation And Recovery Act.
3. Comprehensive Environmental Response, Compensation and Liability Act.
4. Ludlow Landfill, Record of Decision, RI/FS Reports.
5. Quarterly Status Reports, Inactive Hazardous Waste Disposal Sites, NYSDEC.
6. 6 NYCRR NYS Part 360 Regulations.
7. Meeting Minutes, Hearing Records and Transcripts from the Development and Implementation of the Local Solid Waste Management Plan for Oneida and Herkimer Counties.
8. New York State Solid Waste Management Plans (Series, 1980-1995).
9. Where Will the Garbage Go? A series of reports from the New York State Legislative Commission on Solid Waste Management.

10. Organized Crime In Solid Waste Management, A Report From the Legislative Commission On Solid Waste Management.
11. Meeting Minutes, Hearing Records on Landfill Siting.
12. Approved Landfill Siting Methodology for Oneida and Herkimer Counties.
13. Home Rule Messages – Asking for Local Laws.
14. Home Rule Messages – Creating the Authority.
15. NYSDEC Flow Control Survey.
16. New York State Association For Solid Waste Management Flow Control Study.
17. Senate Bill S534 on Flow Control.
18. Authority Bond Documents, Indenture.
19. City of Utica User Fee Study.
20. Solid Waste Inspection and Compliance Reports.
21. Authority Fee Structure Resolution, 1995.
22. Authority Meeting Minutes Pertaining to Remington Arms.
23. Recyclables Contracts, Purchase Agreements.
24. Resource Recovery Project Grant, 8/85, Report on Waste Reduction and Recycling.
25. Solid Waste Practices and Citizen Attitudes Regarding Recycling in Oneida-Herkimer Counties, John Zogby Associates, 4/88.
26. Recycling In Oneida and Herkimer Counties, A Report of Research, Gordon S. Black Corporation, 6/13/91.

WHEREFORE your affiant respectfully requests that this court deny the motion of the plaintiffs for summary judgment, afford the defendants additional time to conduct discovery and to prepare and present additional evidence relating to the claims made in the complaint, and otherwise issue such order and grant such relief as may be just and proper.

Sworn to me

this 7th day of July 1995

/s/
William A. Rabbia
4986993
Notary Public State of new York
Appointed in Oneida County
My Commission Expires 9/30/95

/s/
Hans G. Arnold

Exhibits

A-1	Oneida-Herkimer Local Solid Waste Management Plan
A-2	Recycling Poster
A-3	Recycling Mill Letters
A-4	Letters Discouraging Recycling
A-5	Recycling Markets Graph
A-6	Public Participation in Recycling Graph
A-7	Plaintiffs' Permit
A-8	1/5/95 TSI Letter
A-9	Hauler letters
A-10	UHA Resignation Letters
A-11	Congressman Boehlert's Affirmation
A-12	Newsclips on Authority Programs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

Affidavit In Opposition to
Plaintiff's Motion for Summary Judgment

Robert F. Julian, being duly sworn, deposes and says:

1. I am a lifelong resident of Utica having graduated from high school in Utica and Utica College, and I am a practicing attorney. My law firm limits its practice to representing plaintiffs in personal injury and civil rights cases. Most of my caseload is in the area of medical malpractice. I am a member of the New York State Trial Lawyers Association, the New York State Bar Association, the Oneida County Bar Association and the Association of Trial Lawyers of America. I am a Board certified civil trial attorney and hold an A.V. rating by Martindale Hubbell. I am also a partner in several Utica businesses. I do not handle environmental cases and have declined offers to do so both during my service as a member of Oneida-Herkimer Solid Waste Authority and since that time.

2. I have had a strong interest in community service throughout my adult life. I chaired the Oneida County Charter Revision Commission in the early 1970's. I was first elected to the Oneida County Board of Legislators in 1977 and was elected Majority Leader in 1980. I currently serve on the Ways & Means Committee, Environmental Conservation Committee, and the Laws & Rules Committee. I served as Chairman of the Planning

Committee from January of 1978 through December of 1981 and as Chairman of the Resource Recovery and Solid Waste Committee from January, 1986 to the end of 1987 and Chairman of the Environmental Conservation Committee from 1/1/88 through 12/31/91. My only paid public sector jobs in the last twenty years have been as a County Legislator and as a member of the Oneida-Herkimer Solid Waste Management Authority. I presently contribute my salary after taxes back to the County or to charity. This has been my practice for years. I contributed all of my compensation from the Solid Waste Authority to Notre Dame High School in Utica as a charitable contribution.

3. In addition to my elected office, I am also active in community issues. I serve on the Utica College Board of Trustees. I am President of the New York Penn Professional Baseball League Experience in the City of Utica

4. I am personally familiar with the problems in solid waste management services encountered by the City of Utica over the last two decades. I watched during the 1970's when seemingly every waste collection bid by the City was met with only one proposal. And I became very concerned when I learned that the only bidder (Waste Management, Inc.) also owned the major landfill (Mohawk Valley) serving the region. As can be documented through inspection of the City's files, there were regular price hikes for collection and disposal and yet there was essentially no competition for the collection contract. I have attached some newspaper articles which recorded Waste Management Inc.'s activities and the financial impact on the city (see Exhibit J-1).

5. In 1984, the City was unable to get any other companies to bid on the collection contract because Waste Management, Inc. owned the local landfill, thereby allowing them a unique advantage in the bid. Browning Ferris Industries specifically declined to bid for that reason. Waste Management had a lock on the City waste collection and disposal contract (see Exhibit J-2).

6. Evidence will show that Waste Management used the Utica collection contract as leverage to keep their local landfill open. As indicated in a 12/14/82 letter by County Planning Commissioner Michael Gapin, if Waste Management, Inc. didn't win the collection contract they would likely choose to close the local landfill, thereby placing the region in a disposal crisis (see Exhibit J-3).

7. In only looking at a single instance, Waste Management doubled the disposal rate at the Mohawk Valley Sanitary Landfill in 1986 giving customers only six weeks notice. No basis for the increase was stated and it came in the middle of Utica's three-year contract. City Engineer John Zegarelli noted the "drastic" financial impact on the City in a 9/18/86 Daily Press news article. Zegarelli suggested that a new regional waste-to-energy facility would be the long-term answer for the region (see Exhibit J-4).

8. Information in the City files will show that the company that won each collection contract and which owned the landfill (Waste Management, Inc.) did not install a system of scales for weighing and assessing fees. They "estimated" the volume of waste they collected in the City. When the state finally forced the installation of scales in 1991 the hard fact was that they had "overestimated" the

waste volume by 30%. For 20 years, or possibly longer, City residents were grossly overcharged for solid waste services.

9. This experience in Utica demonstrated that a solid waste service, if left totally to the private sector, would leave an inordinate risk of significant overcharging and other unfair and predatory practices. This experience early in my public life demonstrated that the totally private approach to waste management had failed and that my community needed a system to meet the public needs and protect the public interests.

10. More recently, another pervasive and completely unacceptable outcome of totally private control is indicated by the recent action brought by Manhattan District Attorney Robert Morgenthau culminating a five-year investigation into organized crime's control over the City's commercial waste. The New York Times account of the activity tells a story of price fixing that caused consumers to pay rates inflated by 40% and of threats and violence to enforce organized crime's "service areas" (see Exhibit J-5).

11. When the County Solid Waste Management Laws were put in place in 1988 and Utica's disposal needs could be met by a public system managed by the Authority, several positive results were realized by the City. For the first time in 20 years, several firms submitted bids for collection. No longer held hostage to the private sector disposal services, the cost of collection came down. City residents saw a direct financial benefit. For the first time, the playing field was made level, the rules were the same for everyone.

Local Solid Waste Problems

12. If Oneida and Herkimer Counties, and their local governments, had not acted and had left the private disposal industry to develop a landfill, the public's interest would not have been served. The only significant private sector effort to site a landfill in this community was Waste Management's effort to expand the environmentally questionable Mohawk Valley landfill in Frankfort. The County's elected representatives saw this and made a necessary commitment, on the public's behalf, to investigate feasible options and secure a public system that could avoid these problems in the future.

13. During the 1980's there was an avalanche of solid waste problems. The public began to understand that solid waste was more than just an inconvenience or a nuisance to be endured. People living near landfills and many other less "formal" waste disposal sites became legitimately concerned and genuinely fearful. They viewed waste disposal practices as an environmental assault on their land and water and homes. Citizens' groups formed and cries for closing landfills grew louder. People demanded a new approach, an approach that would cut down on waste and protect their safety. Locally, the issue of proper management of infectious waste was also a cause for significant public concern. Hospitals, often located in or very near residential neighborhoods, were relying on outdated incinerators to burn all categories of infectious waste. In addition to the strong and objectionable odors, neighbors became very concerned that they were being subjected to a health hazard, ironically caused by a health care facility. People came to our meetings and demanded that these incinerators be closed, and that we address this problem for the long-term. Many of these

concerns and strongly held beliefs were reported in hundreds of newspaper articles (see Exhibit J-6).

14. Elected officials representing towns, villages and cities were the first to be confronted with solid waste issues. Their residents pressed for action. The state reacted and began mandating local governments to make large new expenditures to upgrade their landfills and protect streams, groundwater, and public drinking water supplies. In the early 1980's the County Environmental Health Director issued orders not to drink the water emanating from areas near several local landfills. Residents expressed opposition to the importation of waste from outside the area.

15. Although it is not intended as an exhaustive list, elected officials from at least the following Oneida and Herkimer County communities were faced with serious and immediate solid waste problems: Utica, New Hartford, Rome, Whitestown, Annsville, Boonville, Camden, Vienna, Verona, Augusta, Clinton, Waterville, Paris, Bridgewater, Forestport, Oriskany Falls, Webb, Ohio, Salisbury, German Flatts, Ilion, Mohawk, Little Falls, Herkimer, Frankfort. These elected officials, representing a combined population of over 300,000 recognized the need for a coordinated, regional approach to develop a safe, solid waste management program. Given adequate time, a significant number of local elected officials will confirm that they, and the public they represent, clearly saw the need for the County to develop a public system.

16. In 1983 the state reported that most of the landfills in the area were operating without permits and that very few were in compliance with state regulations. At the same time, the state started identifying hazardous

waste sites. During the 1980's in Oneida and Herkimer Counties over 40 sites were identified and at least seven of these were classified as posing a significant threat to the environment and public health. In the years following, 16 waste disposal sites were required to close and remediate the surrounding environment at a total cost of over $74 million. The public's share of that cost exceeded $67 million.

17. In addition to the developing awareness of local elected officials and state regulators, the community saw first hand in the 1980's the problems and risks that had been created by private landfills and waste disposal practices. At various times the state included on their hazardous waste site lists the Mohawk Valley Landfill in Frankfort, the Ludlow Landfill in Paris, the Empire Recycling and Universal Recycling scrap yards in Utica, and the Guerriero Landfill in Frankfort. While many sites were operating without permits and out of compliance with regulations, there was an even more revealing trend when Attorney General Robert Abrams conducted a "sting" operation in 1986. Landfills in our area – including Ludlow's and Guerriero's – accepted what they were told was toxic waste. Abrams said it was "disturbingly easy" to dump illegal wastes at some landfills and that "the threat from toxic chemicals is so serious, even one incident of lax security is too many" (see Exhibit J-7).

18. Disposal at Mohawk Valley Landfill also raised concerns about the financial exposure to Utica residents, given their past use of the site, in the event of a state or federally mandated remediation. Before 1985 there was little choice as to which landfill waste would go. And most landfills were equally

bad. But the message from Congress on the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Resource, Conservation and Liability Act (CERCLA) taught everyone that no share of responsibility for an environmental problem is small. When the County readied to open the Energy Recovery Facility in 1985 I strongly opposed a proposal to use the Mohawk Valley Landfill for disposal of ash because it would have opened the door to a significant liability. Instead, the County Legislature voted to spend the money to build a new double-lined landfill to make sure the environment would be protected and that the public would not be subjected to an unlimited financial exposure.

19. This part of the experience with solid waste management awakened everyone that we, as a society, had created serious problems that would now be revisited. Local officials were on the firing line. The public was outraged.

The Ludlow Landfill

20. There were a series of developments involving the private Ludlow Landfill in the Town of Paris that had great local, state and national significance. These developments had significant bearing on the public's attitude toward how solid waste is managed and what their responsibilities are. I was Town Attorney for Paris while the landfill was in operation and when it was listed as a hazardous waste site.[1] The Ludlow Landfill was identified as a hazardous waste site by the State Department of Environmental Conservation because PCB's (polychlorinated biphenyls) were detected in and around the landfill.

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[1] The NPL, on information and belief, now contains a listing of over 2,500 sites, many of which contain municipal solid waste from homes.

In 1982 the site was placed on the National Priority List which identified 418 sites nationwide requiring priority attention to eliminate significant threats to public health and the environment. The Ludlow site was among 26 such sites in the state and the only site in Oneida County. The owner of the landfill never obtained a state operating permit, but had accepted waste collected by private haulers from many local citizens.

21. My main concern in representing the Town was to insure the protection of public and private water supplies which might be contaminated by the landfill. I arranged for hydrogeologist Dr. Herman S. Muskatt to prepare a report on the landfill and in April 1983 he submitted his findings indicating:

    - No measures were taken to prevent groundwater contamination.
    - Leachate was discharging to surface waters.
    - There was a potential for leachate from the landfill to eventually effect the water supply of homes and the Clayville water well west of the landfill.

22. Following this, the Town took every reasonable step to monitor the potentially impacted water supplies and to press for closure and securing the landfill so that future problems would be eliminated.

23. Soon thereafter, investigations at Ludlow brought home to the community the new degree of risk and responsibility for solid waste management. Although the regulators, engineers and geologists charged that the source of the PCB's was principally one or two local industries, lawyers for those industries filed a sweeping action in Federal District Court against 603 third-party defendants.

The action was to collect money from all these defendants to pay for the federally mandated remediation. The two industries sued local businesses including fabric stores, grocery stores, restaurants, school districts, country clubs, and 29 local governments. These local businesses were generators of typical, traditional solid waste – not hazardous waste. Yet, under CERCLA they were found responsible for paying for a share of the clean-up. I found that a comment recorded in 12/2/90 Observer Dispatch article best reflects the public's new found recognition of their long-term responsibility:

> "Everybody in the Country is going to be responsible up to 20 years ago for whatever they threw out, and for whatever their garbage man might have done with it."
>
> Edward A. Zammiello, Jr.
> Co-Owner Frank' s Body Works
> (see Exhibit J-8)

24. As this community watched, studied and in many cases paid huge costs as the Ludlow Landfill case unfolded, we saw clearly that there had to be a significant public role in managing our solid waste. As a community we could not risk repeating the expensive path of the past.

Reduction, Resource Recovery & Recycling

25. By the mid 1980's this region was suffering from a severe solid waste crisis. A continually increasing mass of undifferentiated solid waste was being generated and was a problem of tremendous proportion. The state moved first to close the older public landfills like Northern Oneida County (NOCO), Rome, and Utica. The private sector made

no effort to solve the problem, they only sought to keep their landfills open and operating at a profit. Pitched legal battles were fought to keep Ludlow, Mohawk Valley and Guerriero open, even though they didn't have permits and couldn't comply with the environmental standards of the day. The private sector showed no ability to handle the region's problem even for the short-term. The County took a major step forward by opening the Energy Recovery Facility in Rome to handle waste from the Western part of the County. The private sector make no effort toward this type of resource recovery and it took necessary action by the County to move away from private sector disposal into a method that would reduce our dependence on private landfills. This commitment by the County also represented a strong link with one of the region's major employers, Griffiss Air Force Base.

26. The private sector was making no effort at waste reduction and recycling. No significant private sector household waste recycling program existed in this county before or during the 1980's. The private sector waste disposal industry profits and, therefore, their viability are inexorably linked to increasing the volume of waste. Large-scale community-wide recycling would have reduced waste and reduced their profit. So they would never start recycling without a public requirement to do so.

27. The County Charter imposes upon the County Legislature the duty to make policy for the County. In developing a sound long-range waste management public policy, we recognized the need for a change. Experience was showing that we needed to reduce the volume of waste, develop markets for recyclables, provide opportunities for recycling and provide for environmental protection and security.

We could not let the public's health, safety and welfare continue to be imperiled by the slip-shod solid waste practices endemic to private sector disposal.

28. The approach ultimately started to address these problems, disposal after a vast amount of study and public participation, was to develop a public system.

Public Solid Waste Management Policy

29. As anyone who reads a newspaper knows, and as any elected official who has served on a solid waste committee will tell you, there is no public issue that surpasses solid waste for the public interest and participation.

30. As a county legislator I listened to years of public comment before the Energy Recovery Facility (ERF) was built. The County upgraded the pollution control system for the plant in response to public comments. We later voluntarily instituted annual stack testing to confirm compliance with standards. As the ERF was being developed, the public said that the County should have a more aggressive recycling program. When we sited the Energy Recovery Facility in Rome in the early 1980's, there was strong citizen input in favor of a countywide recycling system.

31. The public called on the County to find a solution to the massive solid waste problem. At a September 1986 meeting of local waste haulers, *two of the plaintiffs in this case*, as well as the other haulers in attendance, called on the County to develop a new public regional landfill as a safeguard for the pending closure of the Mohawk Valley Landfill. The private haulers then recognized the need for security, just as they did when the Ludlow litigation shook

their financial security, and they called on the County for a necessary public solution. Now a few of the same haulers seek to completely tear down what they asked the County to do – once the public is irrevocably committed.

32. As the Chairman of the Environmental Conservation Committee, I was involved in bringing together towns, villages and cities and then Herkimer County to formulate an organized regional approach to solid waste management. Supervisors and mayors had been stung by expensive landfill closures and citizens demanding a new approach. Local newspapers editorialized urging action by the Counties (see Exhibit J-9). By 1987 the municipal boards from a number of communities representing the majority of the region's population had approved a contractual commitment toward the development of a county sponsored regional solid waste system.

33. These contracts were a clear and decisive action by local governments that they wanted the County to consolidate solid waste services, develop a regional plan, and create the long-term safe and secure system that only could be done by the public sector. The entire series of contracts among the local municipalities and Oneida County and Herkimer County were and are integral to the development of our public system. With the appropriate time, all these documents, and all proceedings and related documents, should be examined and prepared for the Court as they will further show the basis for the Oneida-Herkimer system.

34. The long and painful experience of citizens and their local elected officials led them to ask the Counties to take a leadership role. I know because I was there, I met with these people and I heard their plea.

35. In an opinion poll conducted by a professional firm in 1988, residents overwhelmingly said that garbage posed a serious problem. The public agreed with and demanded that we develop a system to reduce and recycle. Over 71% said that the recycling should be mandated by local law and 66% said they'd be willing to pay extra for a recycling program (see Exhibit J-10).

36. By definition, only a public sector initiative could make that work. The private sector was not recycling. The counties had to respond to the public's demand. The counties had to be involved to institute a system that would reward waste reduction, develop markets, and provide the significant and necessary subsidy for recycling to make it happen. The private sector proved then and now that they were driven by higher waste volumes and would only recycle highly profitable items. Who is to handle the cost of disposing of recyclables when the market is down? The private sector certainly would not and could not, then or now.

37. It became clear that public involvement was essential to insure that the public policy goals of reduction, recycling and environmental safety would be met.

New York State's Public Policy Role

38. In the early 1980's, the public's vocal concerns about solid waste management and the recognition, by state elected officials that they had to address the problem, led to the creation of the New York State Legislative Commission on Solid Waste Management. This Commission, under the leadership of Assemblyman Maurice Hinchey, Executive Director Gordon Boyd, and Attorney Lawrence Schillinger (now a representative of the plaintiffs), moved to chronicle all major solid waste problems and to then develop

state legislation to meet the long-term public objectives.

39. The Commission gathered data, held hearings and convened inquiries including depositions of waste haulers thought to be involved with organized crime's monopoly of solid waste services in part of the state. In addition to the issue of organized crime's involvement and control of the private waste industry, the Commission also studied issues including price fixing, illegal disposal, environmental damage from waste disposal facilities and practices, emissions from waste-to-energy plants, the need for more protective environmental standards, the creation of recycling markets, the problems of burgeoning volumes of packaging waste, and viable community source separation programs.

40. I met on numerous occasions with Assemblyman Hinchey to discuss the developing state policies and our own system in Oneida and Herkimer Counties. At my invitation, Assemblyman Hinchey came to our region several times; he toured our facilities and he met with our County Legislature. In my discussions with Assemblyman Hinchey, he also recognized the need for strong state and local initiatives to move away from the bad practices of the past into the new environmentally conscientious system of the future. He saw that the private sector would not make these changes because their interest was in keeping old facilities open as long as possible and in increasing the volume of new solid waste. He recognized the private sector's action in many areas to monopolize control, drive out competition and then establish a system without consideration of the communities' and the state's public policy goals.

41. Assemblyman Hinchey sponsored and forged approval of bold new state legislation that provided a policy framework for future solid waste management. This legislation, known as the Chapter 70 Laws of 1988, required that source separation recycling laws be adopted by all localities by 1992. This legislation called for establishing "planning units" to promote a regional and coordinated approach to developing a public solid waste system. The legislation set in motion programs and incentives to create new markets for recyclables. The centerpiece of this legislation was the clearly articulated public policy that there should be a hierarchical approach that makes waste reduction and recycling the first priorities. It established a clear public policy mandate and the necessity for public involvement.

42. The Legislative Commission not only initiated major proposals, they also reviewed, and controlled, the consideration of all requests for solid waste legislation from local governments. The statutes creating public benefit corporations, like the Oneida-Herkimer Authority, and authorizing localities to direct their waste (flow control) for development of a local integrated system, must all be approved by the Commission. The Commission insures that the laws, prepared at a home rule request, are consistent with the state purpose and with all public policies as set forth in state law and regulation. The interests, policies and goals of the State of New York were embodied in the state statute creating the Authority. The State's interest was and is coincident with that of the Counties.

Public Hearings

43. As Chairman of the Oneida County Legislature's Environmental Conservation Committee, I held hearings and collected testimony on the wide range of solid waste issues facing our community.

44. The records of the multitude of hearings held on the following topics, together with the submission from groups including, but not limited to those below, will demonstrate conclusively that the purposes of the plan and legislation later adopted were to create an integrated public management system for all waste generated in the Counties. This voluminous material is available, but could not be fully examined and prepared for submission to the Court in the brief time allotted for response to plaintiffs' motion. However, there was an unprecedented broad base of public involvement, and I particularly noted that private citizens, environmental groups and industrial representatives all participated extensively. In the case of the latter, representatives of our region's major industries including Revere Copper and Brass, Rome Cable, the Original Herkimer Cheese, and the Mohawk Valley Economic Develop Council, were very supportive of a regional and public system to resolve the solid waste problem.

Major Hearings - Topics

- Integrated System
  - Nature of Problem
  - NYS Hierarchy
  - Recycling Markets
  - Public Health Risks
  - Waste-To-Energy
  - Methods of Charging and Paying
  - Creation of Authority
- Recycling Markets

- Infectious/Biomedical Waste
- Mohawk Valley Landfill
- DGEIS/DLSWMP (series)
- Waste-To-Energy
- Agriculture

Participating Groups

- Interested private citizens
- Izaak Walton League
- Cooperative Extension
- Regional Economic Development Council
- Utica Area Chamber of Commerce
- Major Local Manufacturing Industries
- NYSDEC
- Scrap Industry
- Environmental Groups
- Recycling Industry
- Local Elected Officials
- Local Hospital Administrators
- Farm Bureau
- Environmental Management Council
- Educators

The Local Solid Waste Management Laws

45. There was a strong, broad-based consensus among citizens, businesses, industries and local elected officials that there had to be a regional and public system of programs and objectives of Oneida and Herkimer Counties. Based on extensive facilities to serve the solid waste management needs and interaction with the public, it was clear that they wanted a new recycling based approach. They wanted their duly elected representatives to put a solid waste management system in place that would increase and reward waste reduction, require recycling and make sure that the environment and their health and safety was protected.

46. The county legislators then took action in response to the concerns and demands of their constituents. I prepared a draft of a local law to meet the following objectives:

    - To replace high volume, undifferentiated waste and disposal with a system that would match the best management method to each component of solid waste. The draft local law created separate provisions for each major category of waste.
    - To make waste reduction and recycling the legally mandated top priorities for solid waste management in the County.
    - To establish and expand markets for recyclables.
    - To protect the public health, safety and welfare by requiring regular collection and environmentally sound waste processing and disposal throughout the Counties.
    - To stop backyard burning and roadside dumping of waste.
    - To make sure that both recyclables and waste would be set-out at the road, by waste generators, in a form and manner to insure its proper delivery to the recycling and disposal facilities.
    - To establish a basic framework of responsibility, consistent with state and federal laws, for waste generators, haulers, towns, villages, cities and the county or its agent.
    - To conserve vital natural resources.

47. After preparing the draft local law and reviewing it with legislators from Oneida and Herkimer Counties, the Environmental Conservation Committee met with local governments by attending their regular

board meetings in order to gain input on the draft. It was presented at numerous meetings of service clubs and civic groups. A series of six advertised public hearings were held around the region on the draft local law. Input was sought and received from a broad cross section of the public.

48. The broad-base of public input allowed us to improve and refine the local law. The extensive input received at hearings indicated overwhelmingly that the public wanted the County to develop a solution to the solid waste problem and to adopt a local law as the legal basis. The public asked for the following changes in the draft which were made before the local law was adopted:

    - Increase penalties for violations.
    - Tighten prohibitions against backyard burning and roadside dumping.
    - Include a permitting system for haulers.
    - Allow businesses and industries to market their recyclables without direct involvement in the County system.

49. The local solid waste management laws were heralded as landmark legislation leading the community to a new and better way of managing a difficult problem. Oneida County was the first New York county to pass mandatory recycling legislation (see Exhibit J-11).

Implementation Of The Public System

50. Elected county legislators, on behalf of and at the request of their citizen constituents, made commitments to the development of a public solid waste management system that would make reduction and recycling the first priority and would

create an integrated, comprehensive, systematic and environmentally sound program. As the elected representatives, we then had to consider the best way to implement the system.

51. The Counties evaluated a number of alternatives for an organizational and administrative structure to carry forward such an effort. Alternatives included districts (part-county and multi-county), inter-municipal agreements, agencies, departments and an authority. Additional meetings were held with local elected officials, who were invited to again provide input on the structure that should be created for the development of such a system. There was a need to make sure that this effort would be done in an efficient, business-like manner, and that public accountability would be maintained. Because this system would require not only significant capital outlay but also the undertaking of several important but individually unprofitable programs, the approach would have to be able to use the most equitable financing mechanisms available.

52. There was a consensus of the county legislatures that the creation of a public benefit corporation (authority) could best serve these needs. A home rule request was adopted by each County legislature and forwarded to the State. On September 1, 1988 the Governor signed the Public Authority Law authorizing the creation of the public benefit corporation: the Oneida-Herkimer Solid Waste Management Authority.

53. The statute authorized the Counties to create the Authority, appoint its board of directors and establish, through subsequent agreements and contracts, the parameters of the Authority's function and operation. The state statute, enacted at the home

rule request of both county legislatures, authorized the Counties, through the Authority, to establish a public monopoly system for managing solid waste in the region. I was appointed to the Authority Board and elected its first Chairman.

54. The Counties worked carefully to comprise a Board of Directors that would make decisions based on the best long-term interests of the entire two-county region. The Counties looked to lay professional people like Dr. Guy Wilcox, who was Medical Director for St. Luke's Hospital and an infectious disease specialist. He had been involved in the Hospital's efforts to improve their infectious waste management. Dr. Michael Lane, a Ph.D. in geology, was brought on to provide expertise in the siting of facilities in environmentally sound areas. Frank Dolan, a registered professional engineer, was appointed because of his expertise in public utility systems. Robert McLaughlin was the founding President of Herkimer County Community College and offered the experience of developing responsive educational programs. Gerald Brodock brought to the Board the experience of a career as negotiator for Revere Copper and Brass and as an individual who started, owns and operates a local manufacturing company. Barbara Freeman was appointed because she was recognized as the leading environmentalist in this region, and as a life-long school teacher she could help with environmental education. Harry Hertline was appointed because of his experience as a contracts negotiator with General Electric and his public service as a county legislator. David Link brought the perspective of a small businessman who works with environmental regulations. R. William Burrows was recognized as a business leader in the region, owner of a local bank, and owner of a local

and international paper manufacturing and paper recycling industries. The combination of expertise comprised on the Authority Board provided the highest quality representation of our community.

55. Although the Authority became operational in 1988 and provided a means of administering the development of the system, there was also a need to define the basic relationship among the Counties and Authority and to define the responsibilities of each. The May 1989 Agreement did this and its essential provisions include a formal agreement that:

- The Authority was created for the express purpose of providing for the management of solid wastes generated within the Counties on a regional basis.
- The Counties determined that it is in the public interest to have the Authority provide a system for the proper management of solid waste on their behalf.
- The Authority would agree to lease or buy the existing facilities (and those under development) of and from the Counties.
- The Authority agreed to secure all other necessary facilities and programs to manage all the region's solid waste.
- The Authority agreed to finance waste management activities on a revenue basis, recognizing the equity inherent in such a system and to set disposal (tipping fees) at the level to cover all operating and debt service obligations.
- The Counties agreed to deliver or cause to be delivered all waste and recyclables to the Authority facilities.

56. Very recently another County Legislator and I conducted a survey of our legislative districts which include Uticans who live in South Utica, Cornhill, and West Utica to gauge their opinions on key local issues. Uticans favor regionalization by an incredible 21-1 margin. On the solid waste issues, 89% said the Authority is doing a good job with its recycling programs and 75% said the Authority is doing a good job in its efforts to locate a new two-county landfill. This survey shows that Uticans are calling on the elected officials to move on regionalization, consolidation and cooperation, just as was done with the solid waste management system.

57. The provisions in the May 1989 Agreement committing the Counties and the Authority to a revenue-based financing method for the system costs expected to be incurred was a deliberate choice among several financing options. The subject of finance, and particularly the equitable distribution of the financial burden of the system, had been a topic at public hearings, legislative debates and planning sessions on the proposed system.

58. The Counties were quite familiar with a variety of financing options available for the provision of solid waste services under the Constitution, Tax, and Municipal laws of the State of New York. Because it had been agreed for purposes of efficiency and accountability to commit to the Authority the responsibility for managing the system and making financial expenditures without duplicative County efforts, funds for this purpose had to be raised from the public and directed to the Authority.

59. Two broad options for raising necessary funds presented themselves, whether implemented by the

Counties (and passed on to the Authority), or by the Authority directly. The first was the use of real property taxation, via general ad valorem taxes, special district charges, user fee assessments, or pursuant to the Authority's power to levy charges against real property in the Counties under Public Authorities Law § 2049-33(14). The second was the use of tipping fees for waste handled and disposed of by the Authority.

60. The option of cost distribution for solid waste services on the basis of the value of real property in the Counties, or a system whereby uniform user charges would be apportioned to parcels of real property, was rejected as inequitable, if not presumptively irrational. There is no necessary relationship between the value of any piece of property and the value of the solid waste service it requires or consumes. Some relatively low value properties in the Counties actually generate very high volumes of waste, and therefore consume a proportionately larger share of the solid waste service provided by the Authority, than higher valued properties, which may often generate little waste. Additionally, both Counties have a significant and higher than average proportion of tax exempt property.

61. Consequently, taxing property for waste services based on the value of the property creates a windfall for those properties of low assessed value but which consume a large degree of waste services. Similarly, assessment of a user fee to all properties, regardless of assessed value, is inequitable for the majority of properties, since the average value of services consumed by each property is skewed upward by the fact that a relatively few properties generate far greater than average amounts of waste. Moreover,

charging from the real property tax base for waste disposal was unfair to cities like Utica and Rome with a high percentage of tax exempt properties.

62. Finally, it was recognized that no fixed correlation between the value of services to property was even desirable, as the goal of the system was to fundamentally change the public's waste generation habits: to reduce overtime, the amount of waste generated and increase recovery through recycling.

63. The City of Utica was also coming to a similar recognition in terms of how they would fund the cost of providing solid waste services. They wanted to get away from the inequity of property tax system and to give incentives to residents for recycling. We funded and jointly conducted a study with the City which evaluated different ways this might be accomplished. With adequate time for a full examination of this report, it will be clearly demonstrated that alternatives were carefully examined and that a user fee approach was, and is, the most fair and equitable. This work was the basis for the City's decision to institute a user fee system that would have each resident purchase a designated bag for their waste disposal. The price charged for the bag was set to cover the cost of providing the service. A direct economic incentive was thereby created to encourage each resident to reduce their waste and recycle as much as possible. This system, now in place over six years, works. Utica has among the best recycling rates; people pay for the amount of waste they generate (and they can save money if they recycle more), and the tax base is not burdened.

64. For these reasons the Counties determined to finance the waste management system through fees charged

to users of its facilities based upon the amount of waste delivered (tipping fees).

65. The practice of the waste collection industry, then as now, is to bill the waste generator or customer the cost of both collection service and the anticipated disposal fee to be paid to the disposal facility. The collection firm serves as a conduit for disposal costs paid by the generator to the disposal facility, and with Authority fees set at uniform amounts for all haulers and generators, the cost burden is borne by generators in direct proportion to the amount of waste each sends to the disposal facility.

66. In addition, the tipping fee system enables the Authority to provide incentives for recycling and waste reduction by accepting recyclable materials without charge, while financing commercially unprofitable, but environmentally valuable programs, such as household hazardous waste collections, with revenues derived from deliveries of non-recyclable waste. The broad incentive to all citizens is to generate less waste by diverting larger fractions to recyclable markets. Citizens who recycle more waste at an earlier point in time save more money sooner than citizens who join the program late. In that way the financing structure not only assesses costs equitably, but advances the goals of the system in a way that a private market system could not.

67. The adoption of the tipping fee method of financing did not absolve the Counties of all financial responsibility for the operation of the system. The Counties remain, and were intended to remain, financially responsible for the operation of the system to the extent that the primary financing method cannot do so. Moreover, the Counties clearly provide the ultimate security for the bonds of

the Authority, as set forth in the December 1989 Agreement submitted to the court by the plaintiffs.

68. The statements contained in this affidavit are true to the best of my personal knowledge and belief. Documentation for the statements contained herein exists in the files of the various municipalities of the Counties, in the records of the State of New York, can be confirmed and elaborated upon by expert testimony, or is known to the plaintiffs. A fuller presentation of the evidence contained herein was not possible, despite the efforts of the defendants, due to the shortness of time afforded since the filing of the Complaint and this motion.

WHEREFORE your affiant respectfully requests that this Court deny the motion of the plaintiffs for summary judgment, afford the defendants additional time to conduct discovery and to prepare and present additional evidence relating to the claims made in the complaint, and otherwise issue such order and grant such relief as may be just and proper.

Sworn to before me
this 5th day of July 1995

/s/ Robert F. Julian
Robert F. Julian

/s/Tracey A. Synakowski
Tracey A Synakowski
Notary Public, State of New York
Qualified in Oneida County
(No. 4862486)
My Commission Expires Sept. 2, 1996

EXHIBITS

J-1	Newspaper articles WMX monopoly on city collection, cost impact.
J-2	BFI letter.
J-3	12/14/82 Gapin letter to Pawlinga.
J-4	9/18/86 Daily Press Article.
J-5	New York Times Article.
J-6	Avalanche of problems.
J-7	Abrams sting news article.
J-8	Ludlow article – Zammiello quote.
J-9	Editorials urging County action.
J-10	1988 John Zogby Poll.
J-11	News article July 88 Passage of Local Law.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

Affidavit in Opposition

MICHAEL A. GAPIN, being duly sworn, deposes and says:

1. I reside at 3161 Fountain Street in the Town of Kirkland, Oneida County, New York, and I am the Program Director for the Herkimer-Oneida Counties Comprehensive Planning Program and Commissioner of the Oneida County Department of Planning, positions I have held since 1978.

2. Beginning in 1970, and prior to the formation of the Oneida County Department of Solid Waste Management and the Oneida-Herkimer Solid Waste Management Authority, my responsibilities included examining the two-county region's solid waste management practices and planning solutions to any problems identified. During this time period, a number of solid waste management planning and feasibility studies were conducted by or on behalf of the counties, either under my direction or with my substantial involvement. As Commissioner of Planning for Oneida County, I was heavily involved in the siting, planning and permitting of the Oneida County Energy Recovery Facility and lined Ash Landfill that served the western Oneida County and greater Rome area.

3. One of the fundamental principles of community planning and economic development is that there are three basic public "utility" functions which are essential to the economic and environmental well-being of a region. These are the provision of systems for a clean supply of water, for treating wastewater discharges, and for managing solid waste. In order for an area to be viable, it must be able to provide its citizens, businesses and industries with these three

essential systems. For each, the system must provide safe, reliable, consistent service. In order for an area to grow, to bring in new development and job creating industries, these basic pieces of public infrastructure must be in place. They are essential elements of good economic policy. They are no less important to a region's viability than roads, bridges and schools.

4. If a community establishes the public policies to secure and develop these systems, the community has taken a major step in enhancing and securing its future. A community, as part of these public policies, can establish community goals such as creating expansion capacity to attract new development. And, in the case of solid waste management, a community can develop a secure public system for the long-term that advances resource conservation, reduces dependance on disposal and provides environmental and economic security. The public policies developed in these two Counties for all three of the major public utility systems have been working toward securing the region's viability for the future. All three public utility systems are essential to our future.

The Old Town, Village and City Dumps

5. In the 1960's, virtually every municipality in Oneida and Herkimer County had a landfill. In most cases, the landfill was owned and operated by the town, village or city although there were also a few privately owned landfills in the region. Providing a landfill for use by local residents and businesses was traditionally viewed as one of the services to be provided by local governments. The costs to run the municipal landfill were typically part of the overall municipal budget, with proof of residency being the primary requirement to gain entrance to the landfill. If user fees or other gate charges were involved, they were generally for a nominal amount.

6. These landfills were typically sited in wetlands or gravel pits, with the landfill being seen as a way to fill in these areas. The early regulations governing their siting and operations were minimal, and in general focused on minimizing nuisances that a landfill could cause. In 1966, for example, Part 19 of the State Sanitary Code set forth the requirements for converting an open dump to a nuisance-free "sanitary landfill":

a. General clean up of the dumping area.

b. Extensive poisoning program to eliminate rodent population.

c. Compaction, covering and grading of existing refuse.

d. Planning and developing the site in a comprehensive manner.

7. In response to a number of inquiries that had been received from municipal officials, our office prepared a memorandum dated December 16, 1966 regarding "The Control of Garbage Dumps and Refuse Disposal" that was sent to all Mayors of Cities and Villages, Supervisors of Towns, Planning Board Chairmen and Attorneys of the two-county region. This memorandum noted that with an ". . . increase[d] emphasis on the elimination of water and air pollution and the control of unsanitary dumping operations every municipality will be faced with the review of its refuse disposal practices." This memorandum also noted that ". . . as part of the Public Utility Study being undertaken by the long-range planning program, a private engineering consultant will review the solid waste problem and develop alternate schemes for regional solutions for disposal." This memo indicates that, as early as 1966:

a. Many local municipalities were experiencing pollution-related solid waste disposal problems.

b. Local municipalities were looking to have their solid waste problems addressed on a regional level.

c. Solid waste disposal was considered to be part of a municipality's infrastructure, appropriate for inclusion in a Public Utility Study.

A public solid waste management system is no less important to a region's viability than adequate drinking water and wastewater disposal systems.

8. The 1969 Comprehensive Solid Waste Planning Study prepared for Oneida and Herkimer Counties reported a total of 44 open dumps operating in the two-county region. At the time, neither county was involved in owning or operating a disposal facility, nor were the counties involved in any other aspect of providing solid waste collection, disposal or recycling services to local residents and businesses. All of these solid waste management services were being provided at the local level.

Growing Concerns About Environmental Impacts of Landfills

9. In the mid to late 1960's, there was a heightening awareness of environmental impacts that were being caused by operation of the old local dumps. The public was becoming increasingly concerned about drinking water contamination, disease carrying vectors, open burning and the potential for other public health and environmental problems that were associated with historical and, at the time, on-going waste disposal practices at unlined landfills (i.e., open dumps).

10. The federal government took some initial steps to address these growing concerns, by enacting the Solid Waste Disposal Act in 1965. This new law provided 50-50 matching federal grants to encourage state, solid waste planning, and two-thirds matching funds for local waste

management demonstration projects that offered alternatives to open dumping. The National Environmental Policy Act, adopted in 1969, provided some early encouragement for development of community recycling programs, and the 1970 Resource Recovery Act promised financial assistance and technical support for states that would prepare solid waste management plans.

11. New York State responded to increasing public concerns about environmental issues by establishing the State Department of Environmental Conservation (DEC) in 1970. This new department took over the regulation of landfills from the health department, although at the time these regulations (Part 19 of the State Sanitary Code, as noted above in paragraph #6) were extremely limited. Passage of the New York State Environmental Quality Bond Act of 1972, which allocated $175 million of matching grant funds for municipal waste projects, provided a source of significant financial assistance for municipalities to improve or develop new solid waste management facilities. Of this $175 million, $5 million was reserved for small scale low technology approaches to recycling and resource recovery.

12. Conditions at the local landfills justified the attention that national and state policy makers were giving to environmental and solid waste issues. The 1969 Comprehensive Solid Waste Planning Study noted that ". . . most of the collected wastes are disposed of in open dumps. Operation of all of these dumps lacks proper control, financing, equipment and operating techniques . . . operations are not in conformance with present State laws. Water and air pollution and health hazards at these dumps can no longer be tolerated." The study further documented potential hazards from the existing dumps to include water pollution, dust, odor, combustible gases, fires, settlement, air pollution, and vector borne disease.

Love Canal and CERCLA Liability

13. The Love Canal incident in western New York drew national attention to the problems of toxic contamination -- many residents were relocated and their properties purchased due to the discovered contamination. The level of public outrage provoked by Love Canal, as well as similar problems at sites throughout the Counties, is largely responsible for Congress's passage of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA, which is commonly known as the "Superfund" law). The Superfund law established the legal framework for financing and remediating sites contaminated with hazardous wastes. New York State has established a similar Superfund program, through the adoption of amendments to the State's Environmental Conservation Law in 1979 and 1982.

14. The Superfund program established a standard of "strict, joint and several liability" for determining who would pay for site clean-ups. Owners and users of some old local dumps are now faced with the prospect of having to pay for site remediation activities that will cost several million dollars at each site. The question of how much each responsible party has to pay is the subject of expensive study, negotiation and litigation. The retroactive nature of the Superfund program means that financial liability for a site clean up can be assigned today for past waste disposal activities that were permitted at the time they took place.

15. No fewer than 12 old landfill sites in Oneida and Herkimer Counties have been classified as State and/or Federal inactive hazardous waste sites. Based on completed and projected work, the cost to remediate these sites in conformance with State and Federal requirements will exceed $74 million.

16. The substantial costs associated with cleaning up these old landfill sites were not included in the tipping fees paid by haulers at the landfill gate. Instead, the costs of

protecting the environment at these sites are being passed on, figuratively if not literally, to the children of those who used these old landfills.

17. This experience illustrates the significant environmental and potential public health problems that have been associated with the improper siting and use of unlined landfills. It also seems apparent that, while it is cheaper in the short run to operate a landfill without a liner and other important environmental safeguards, in the long run the costs to remediate an unlined landfill site will be substantial. And determining who will pay for the environmental clean-up costs -- after such landfills cease operation -- is a difficult, time consuming, litigious and costly undertaking that -- at best -- can only approximate a true allocation of financial responsibility for repairing the environmental damage that was caused by the operation of these unlined landfills.

18. One practical effect of these State and Federal Superfund programs is this -- financial liability for a future landfill clean up should be considered to be a part of every truckload of waste that goes to the landfill site. Moreover, sending waste to a State permitted landfill site is no protection against future clean up liability. Exposure to such liability needs to be carefully assessed on a site specific basis, by examining the environmental safeguards that are in use at (or that are absent from) the landfill site. The site's environmental setting also needs to be evaluated, to determine the potential damages that could result from landfill related pollution. To ignore these environmental lessons of the past would be short-sighted and irresponsible.

Early Efforts to Address the Region's Disposal Problems

19. In response to the environmental problems and health threats identified in the Counties' 1969 study, and as the DEC began to impose more stringent requirements on landfill operations, many of the 44 local dumps were replaced with multi-community "consolidation" landfills.

This was viewed as an interim step toward a regional approach which would be based on resource recovery. These consolidation landfills were run as cooperative ventures by the involved local municipalities, via the formation of special inter-municipal disposal corporations, boards or districts, and included: the German Flatts-Ilion-Mohawk (GFIM) Landfill; the Southwest Oneida County (SWOCO) Landfill serving the Towns of Augusta, Kirkland, Marshall, Sangerfield, Vernon and Verona; and the Northern Oneida County (NOCO) Landfill serving the Towns of Camden, Lee and Vienna.

20. By the early 1970's there were still approximately 20 landfills operating in the Oneida-Herkimer region. Many of these landfills employed trenching and daily cover provisions, which eliminated some of the problems experienced previously. These landfills were not required to be lined, however, and hence did not guard against significant groundwater contamination.

21. Another problem caused by unlined landfills is that the availability of relatively cheap (in the short run) landfill disposal space creates an obstacle which retards the development of new, environmentally sound solid waste management facilities. Since it is cheaper to operate an unlined landfill that does not include important environmental protection measures, the implementation of new environmentally sound solid waste management facilities is stifled because it is more expensive and time consuming to develop and operate a facility in full compliance with more stringent environmental standards. In the absence of equal treatment and enforcement by State regulators, the economic advantage weighs heavily in favor of existing landfills run at less stringent environmental standards.

22. The increased regulatory pressure on the unlined local landfills — to upgrade, close or consolidate — and more environmental awareness on the part of the general public,

led the Oneida County Board of Legislators in 1970 to form the Oneida County Solid Waste Agency. This Agency was a volunteer group of citizens and community leaders, appointed by the Board of Legislators and charged with the responsibility for examining and recommending appropriate solid waste management programs for Oneida County. Several years later, the Oneida County Board of Legislators created the Environmental Management Council, as authorized under Environmental Conservation law, which had a broader charge but also was appointed by the Legislature to provide research, advice and direction on solid waste management issues.

23. During the early 1970's, often in conjunction with the Oneida County Environmental Management Council, the Solid Waste Agency reviewed alternative methods for the environmentally sound, long-term management of solid waste. Alternative recycling and resource recovery projects, including waste-to-energy and refuse derived fuel, were studied and given careful consideration by the public and local officials. Municipalities in the western part of Oneida County (i.e., the Rome area), in particular, requested that the County take the lead in developing a disposal facility or system that would enable the local municipalities to end their involvement with unlined landfills.

24. At this time, the Solid Waste Agency and Environmental Management Council were developing waste reduction and recycling goals, advising the County Legislature, and, with the Legislature's concurrence and direction, establishing the first public solid waste programs in the area including:

- a coordinated schedule of community paper drives working with the municipalities and service clubs;
- a public education program including a multi-media display used at events throughout the region; and

- a program for glass container collection and processing with the Oneida County Association For Retarded Citizens.

National and State Solid Waste Management Policies

25. Communities throughout New York State and the nation were grappling with solid waste issues similar to those facing Oneida and Herkimer Counties. The use of cheap, unlined landfill sites was turning out to be an expensive environmental problem and, in some cases, a public health nightmare. All of the unlined landfills could not, however, be shut down overnight. Solid waste continued to be generated, and in amounts that were increasing from year to year. We still left our garbage out at the curb once or twice each week, it still got picked up, and the garbage hauler still had to find a place that would take it. New disposal facilities had to be developed, to replace the disposal capacity that we were losing as the unlined landfills were being phased out.

26. Developing new disposal facilities was easier-said than done. Love Canal had triggered a heightened awareness among the public concerning disposal sites. Identification of a possible location for a new disposal site made headlines. Nearby residents viewed any such siting proposal as a threat to their health and quality of life. And local officials trying to plan responsibly for their community's solid waste future were faced with a number of difficult decisions. What type of solid waste management facility or program would be most appropriate for the community? What would it cost? How would it be paid for? Who should be responsible for planning it and implementing it? If a new facility was to be developed, where should it be located? What would be the best way to involve the public in the decision making process? What was the best way to address siting controversies and media coverage? And a relatively new question now had to be asked -- how would any such solid waste management proposal

satisfy what seemed to be rapidly changing and increasingly stringent environmental requirements?

27. In 1976, Congress passed the Resource Conservation and Recovery Act (RCRA). RCRA established a firm set of national policies for environmentally sound solid waste management, which guided the development of the State's and Oneida-Herkimer's solid waste management programs, as the following excerpts from RCRA illustrate:

> "The Congress finds with respect to solid waste ... that ... the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies ... " (RCRA Section 1002(a)(4); emphasis added).
>
> "The objectives of this Act [RCRA) are to promote the protection of health and the environment and to conserve valuable material and energy resources by
>
> ... providing technical and financial assistance to State and local governments and interstate agencies for the development of solid waste management plans (including resource recovery and resource conservation systems) which will promote improved solid waste management techniques (including more effective organizational arrangements), new and improved methods of collection, separation, and recovery of solid waste, and the environmentally safe disposal of nonrecoverable residues ..." (RCRA Section 1003(a)(1); emphasis added); and
>
> "...promoting the demonstration, construction, and application of solid waste management, resource recovery, and resource conservation systems which preserve and enhance the quality of air, water, and land resources..." (RCRA Section 1003(a)(10); emphasis added).

... [T]he Governor of each State, after consultation with local elected officials, shall promulgate regulations ... identifying the boundaries of each area within the State which ... is appropriate for carrying out regional solid waste management" (RCRA Section 4006(a); emphasis added). The Authority was created by special State legislation, at the request of local elected officials, to carry out such federally and state authorized regional solid waste management for Oneida and Herkimer counties.

"... [E]ach State [solid waste management] plan must

... identify ... the responsibilities of State, local, and regional authorities in the implementation of the State plan ..." (RCRA Section 4003(a)(1)(A); emphasis added),

"... identify ... the means for coordinating regional planning and implementation under the State plan" (RCRA Section 4003(a)(1)(C); emphasis added),

"... contain requirements that all solid waste (including solid waste-originating in other States, but not including hazardous waste) shall be (A) utilized for resource recovery or (B) disposed of in sanitary landfills ... or otherwise disposed of in an environmentally sound manner" (RCRA Section 4003(a)(2); emphasis added), and

"... provide for such resource conservation or recovery and for the disposal of solid waste in sanitary landfills or any combination of practices so as may be necessary to use or dispose of such waste in a manner that is environmentally sound" (RCRA Section 4003(a)(6); emphasis added).

28. The New York State Legislature has also adopted several laws over the years which express the State's solid waste management policies. The Oneida-Herkimer region's solid waste management programs have been driven by and are in furtherance of the State's solid waste management policies, as the following excerpts from recent State laws illustrate:

> "A state-local partnership, in which the basic responsibility for the planning and operation of solid waste management facilities remains with local governments and the state provides necessary guidance and assistance, must be forged" (Environmental Conservation Law Section 270106(2); emphasis added).
>
> "The [New York state] legislature finds and declares that the proper management of solid waste is necessary to protect public health and the environment. Toward this end, it is necessary to reduce the generation of solid waste, to accelerate the recovery and reuse of secondary materials within the state, to encourage the conservation of resources, to foster public and private initiatives to achieve these ends, and to encourage a new ethic among New York's citizens to conserve and reuse, rather than discard, useful materials. A state-local partnership is essential to achieving these ends" (Section 2 of the Solid Waste Management Act of 1988, L.1988, c.70; emphasis added).
>
> "The [New York state] legislature also finds that many communities face a crisis in development and implementation of environmentally acceptable ways to dispose of the waste produced by their residents and the industries located within their jurisdictions. This crisis demonstrates the need to facilitate planning for and the development of local solid

> waste management programs, to provide additional state technical assistance, and to enhance state programs relating to solid waste management. State assistance in these areas is needed to assist localities which must assess solid waste management alternatives, work with concerned interests and the public in evaluating these alternatives, and design and implement solid waste management programs" (Section 2 of the Solid Waste Management Act of 1988, L.1988, c.70; emphasis added).

"The following are the solid waste management priorities in this state:

> (a) first, to reduce the amount of solid waste generated;
>
> (b) second, to reuse material for the purpose for which it was originally intended or to recycle material that cannot be reused;
>
> (c) third, to recover, in an environmentally acceptable manner, energy from solid waste that can not be economically and technically reused or recycled; and
>
> (d) fourth, to dispose of solid waste that is not being reused, recycled or from which energy is not being recovered, by land burial or other methods approved by the department [of environmental conservation]." (Environmental Conservation Law Section 27-0106(1)).

The Oneida County Energy Recovery Facility

29. In the mid 1970's, as a result of requests from municipalities in the greater Rome area of Oneida County, plus after considerable study, including analyses of potential markets and alternative technologies, development of a waste-to-energy project was pursued by the County. In 1979, Griffiss Air Force Base approved the essential steam

purchase contract for a County sponsored waste-to-energy facility. Revenues from the sale of steam to Griffiss Air Force Base were critical to such a project, since steam sale revenues would partially offset the costs of running such a facility and would thereby lower the tipping fees to be charged facility users.

30. An adequate supply of solid waste was also vitally important to the proposed waste-to-energy project, since the waste represented the fuel supply needed to produce the steam that would be sold to Griffiss Air Force Base. In 1980, the County signed waste supply contracts with the City of Rome, Griffiss Air Force Base, the Town of Floyd Refuse and Garbage District, the NOCO Landfill Board and the SWOCO Refuse Disposal Corporation. These contracts included commitments to deliver waste suitable for incineration to the County's waste-to-energy facility, but also explicitly provided that local recycling activities would not be precluded by such waste supply commitments. Similar waste supply contracts were also ultimately signed between the County and numerous private haulers including plaintiffs Bliss and Bristol.

31. With the steam purchase and waste supply contracts in place, in 1981 Oneida County undertook the environmental analyses and facility design work needed to obtain facility construction and operation permits from the New York State Department of Environmental Conservation (DEC). Upon completion of the rigorous, costly and time consuming environmental review process, the 200 ton per day Oneida County Energy Recovery Facility was built -- along with a lined ash landfill facility that would provide for the environmentally sound disposal of the facility's incinerator ash residue -- and began operating in January, 1985.

32. Implementation of the Energy Recovery Facility was a significant improvement to the region's public

environmental infrastructure. It provided an environmentally sound, local disposal service to approximately 110,000 people in western Oneida County, including the City of Rome. It replaced local, unlined landfills with a modern incineration facility that utilized a specially constructed lined landfill for ash disposal. Its development was in response to the need expressed by local municipalities to avoid the unaffordable upgrading of their unlined landfills, as would be required pursuant to DEC order for their landfills to remain in operation.

33. The Energy Recovery Facility (ERF) represented an important phase in a staged, comprehensive process to develop a public system based on resource recovery and reduction of dependance on landfill disposal. Importantly, the ERF was a step in a process; it allowed for the closure of many unlined landfills and a consolidation of services; it was designed to be flexible so that adjustments could be made to new developments; the general obligation bonds were for 10 years. The ERF met an important need for its planned life of 10 years, and now the region has developed and is developing new programs and facilities to provide for the next phase of service for the two-county region.

Why The Authority Was Created

34. During the 1980's, increasingly stringent environmental regulations continued to cause the shutdown of the local, unlined landfills that had traditionally been utilized. The 1986 Long Range Alternatives Solid Waste Management Study reported a total of only 8 landfills operating in the two-county region, including the lined ash landfill that was a part of the County's Energy Recovery Facility project. Included in this number were four small, part-time Town landfill sites which only provided service for their communities (i.e., the Town of Annsville, Town of Ohio, Town of Salisbury and the Town of Webb Landfills), plus the somewhat larger Town of Whitestown Landfill. Two

privately owned landfills were also in operation at that time — the Ludlow Sand and Gravel Landfill located in the Town of Paris and the Waste Management Landfill located in the Town of Frankfort. Except for the County's lined ash landfill, all of the landfills operating in the region as of mid-1986 were unlined facilities that presented groundwater contamination concerns.

35. Because the Energy Recovery Facility project only served a portion of Oneida County, and in recognition of the inadequacy of the unlined landfills, the 1986 study recommended that Oneida and Herkimer Counties jointly sponsor the development of an environmentally sound project that would address their long-term solid waste management needs. The public had developed a growing and strong interest in the problems of solid waste management. Throughout the process of planning and developing solid waste management solutions, the public let their concerns be known at every meeting and forum. The public then and now wants to make sure their homes and families are protected from pollution. By the mid 1980's they were demanding that we recover valuable resources from the waste stream before we send what cannot be recovered to a landfill. There was a recognition by the public and local elected officials (towns, villages, cities) that the steps taken by the County to build the ERF were a necessary consolidation of services. There was a further public recognition that a coordinated regional approach would be necessary to plan and develop a full service system that would offer recycling and safe disposal for all the area. To facilitate the development of these needed improvements to the region's environmental infrastructure, the County legislative bodies asked the State Legislature to create the Oneida-Herkimer Solid Waste Management Authority.

36. The Authority is developing an important part of the region's infrastructure. A public solid waste management system is just as important as a region's water and

wastewater treatment systems. If there cannot be some public oversight and control of the solid waste collection system, it is akin to having a public water supply reservoir or a wastewater treatment plant without the pipes.

The Haulers Should Not Be Allowed To Use An Unlined Landfill

37. Since its inception, the Authority has continued to pursue the development of environmentally responsible solutions in response to the needs of the Counties, local municipalities, residents and businesses. The Authority is also currently facing some of the same problems encountered by Oneida County during the late 1970's and early 1980's -- specifically, the difficulty of developing an environmentally sound solid waste management system that is threatened by economic competition from an unlined landfill facility. Residents and businesses of the two-county region are already burdened with the prospect of paying at least $74 million to clean up unlined landfill sites that operated in Oneida and Herkimer Counties. The Authority's efforts to be environmentally responsible, and to avoid the risk of adding to this costly $74 million clean-up bill, represent an essential government service that is for the long-term benefit of this region's health and future growth. The haulers' use of the unlined Seneca Meadows landfill facility and other unlined landfills is environmentally unconscionable, it imperils the Authority's ability to carry out important public services, and the use of such environmentally inferior landfill sites should not be allowed.

The Solid Waste Management System Is Critical Public Infrastructure

38. The development of a solid waste system, especially siting new facilities, takes many years. Although collection of waste is important, it is much easier to respond quickly to a collection problem than it is to develop the system of facilities to process the waste. And this two-county area has

made a series of decisions and commitments to the development of a public system to serve the region for the long-term. Based on my 25 years of involvement in planning and developing the public utility infrastructure to serve the region, these actions, decisions, and commitments, made on the public's behalf, are absolutely essential to the health, safety, welfare and viability of Oneida and Herkimer Counties.

39. This statement is a general review of my involvement and my responsibilities with solid waste management. The statements contained in this affidavit are true to the best of my personal knowledge and belief. Documentation for the statements contained herein exists in the files of the various municipalities of the Counties, in the records of the State of New York, can be confirmed and elaborated upon by expert testimony, or is known to the plaintiffs. A fuller presentation of the evidence contained herein was not possible, despite the efforts of the defendants, due to the shortness of time afforded since the filing of the Complaint and this motion. The following is a partial list of reports, laws, regulations and documents which serve as the basis of this affidavit:

1. Part 19, New York State Sanitary Code, 1966.

2. Memorandum from Herkimer-Oneida Counties Planning Staff to Municipalities, "The Control of Dumps and Refuse Disposal", 12/16/66.

3. Comprehensive Solid Waste Planning Study, Malcolm Pernie Engineers, for Herkimer-Oneida Counties Comprehensive Planning Program, 1969.

4. Solid Waste Disposal Act, 1965.

5. National Environmental Policy Act, 1969.

6. Resource Recovery Act, 1970.

7. New York State Environmental Quality Bond Act, 1972.

8. Comprehensive Environmental Response, Compensation and Liability Act, 1980.

9. New York State Environmental Conservation Law, 1979 amendments.

10. New York State Environmental Conservation Law, 1982 amendments.

11. Oneida County Solid Waste Agency, Studies conducted in early 1970's on alternative methods for the environmentally sound, long term management of solid waste.

12. Resource Conservation and Recovery Act, 1976.

13. New York State Solid Waste Management Act, 1988.

14. Energy Recovery Facility Waste Supply Contracts.

15. Documents pertaining to the planning, design and construction of the Energy Recovery Facility.

16. Long Range Alternatives Study, Eastern Oneida and Herkimer Counties, Barton & Loguidice, P.C., for the Oneida-Herkimer Counties Solid Waste Study Committee, the Oneida County Executive and Legislature, the Herkimer County Legislature, 1986.

WHEREFORE your affiant respectfully requests that this court deny the motion of the plaintiffs for summary judgment, afford the defendants additional time to conduct discovery and to prepare and present additional evidence relating to the claims made in the complaint, and otherwise issue such order and grant such relief as may be just and proper.

Sworn to before me

this 6th day of July, 1995.

/s/ Michael A. Gapin
Michael A. Gapin

/s/ Sandra E. Stevener

Sandra E. Stevener
Notary Publ. NY State
County of Oneida
My Commission Expires 2-18-96

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW, YORK

[TITLE OMITTED IN PRINTING]

STATE OF NEW YORK)
) ss:
COUNTY OF HERKIMER)

AFFIDAVIT

RONALD N. SOLTYS, being duly sworn deposes and says:

1. I reside in Old Forge, New York and I am Chairman of the Herkimer County Legislature. I have served continuously on the Legislature from January, 1980 through the present and have been Chairman since January 1, 1990.

2. Managing solid waste in a safe and cost effective way has become increasingly important to the residents of Herkimer County and the County Legislators. Although we weren't aware of it at the time, the unlined dumps we used to use have created some serious problems. In our area, landfills like Rose Valley in the Town of Newport created a lot of concern when it was open and continues to be controversial even today. There are people living close to the Landfill and the Poland Central School is in close proximity as well. Our legislators are often confronted with concerns about contaminated groundwater and a high incidence of cancer, particularly in children, in people Living near the landfill.

3. Several of our towns and villages worked together to build the German Flatts, Ilion, Mohawk, (GFIM) landfill in the early 1970's. Even though that represented state-of-the-

art technology, it didn't prove to adequately protect groundwater. Now residents of those towns and villages are paying for the clean-up costs for a landfill that was permitted by the state.

4. Many of our residents and local governments were also part of the Ludlow lawsuit. Again, even though towns and villages thought they were complying with the requirements, their waste was taken to the Ludlow Landfill. The long term liability and cost came home to roost and our residents had to pay.

5. I own a business: which I operate out of Herkimer County. Between the business and my responsibility on the Legislature, I travel the roads of Herkimer County all the time. In the past, we've had major problems with people dumping loads of garbage along our roads. Most of our roads are remote because Herkimer is a very rural county. I've seen household garbage, construction debris, roofing waste and all other forms of waste scattered along our roads. On many occasions I've taken it upon myself to pick up the garbage illegally dumped along county roads. Our County Highway Department spends significant time cleaning up garbage along the roads. As I travel the County, I also have seen people burning garbage behind their homes.

6. The County Legislature recognized those problems and the need for public action. Our residents wanted these things to stop and as their elected officials, we developed our local solid waste management laws to reflect that.

7. Before about 1987 there was very little recycling occurring in our County, or anywhere for that matter. As explained by the Program Director for our Herkimer-Oneida Planning Program, Mike Gapin, we were working on a plan with Oneida County to see if a regional project could best serve the public and be the way to start recycling locally. The conclusion of our joint effort was that we should develop a

regional two-county system and that it was necessary to have a strong public role in the system.

8. As one of the first steps in this process, our County Legislature adopted a local waste management law in 1988. We did that to make sure that our residents would have safe, reliable service; that we would develop a system which would avoid the past problems of environmental liability and endless clean-up costs; that we would clamp down on illegal disposal; and that we would develop recycling programs also in response to our public's demands.

9. In 1988, we hired David Lupinski as a Recycling Coordinator for the County. His job was to implement the County law, meet with municipal boards to help set up local separation and recycling systems, develop pilot recycling projects, and develop public education programs. As David developed the recycling system we received extensive and positive feedback from the public. The local law and all the related programs were working toward what the public wanted, and still wants.

10. Our legislature recognized the need for a public solid waste system and we made commitments to do that on the public's behalf.

11. As was recommended in studies done by our planning programs, we asked the state to authorize the creation of a regional unit to manage the solid waste system for the county. When the state acted on our request, we made appointments to the Authority and placed highly qualified individuals on the Board to represent the public's interests.

12. Herkimer County is a huge rural county rich in natural resources. It is 922,880 acres in size. This size also presents some problems like the roadside dumping. As we looked to the best way to fund our solid waste management system, considering the size and character of our County in undeveloped land, we couldn't justify paying for solid waste

through the county real property tax levy. Most of our property doesn't generate any waste. It would have been totally unfair to place the cost burden of solid waste on property taxpayers without any relationship to the demand for the service. In addition, we have a significant number of tax exempt properties, about 19%, which would make it even more unfair to fund solid waste through County taxes.

13. We decided that solid waste management services should not be funded through county property taxes but rather should be on a user fee basis. This provides a fairer system that promotes reduction and recycling.

14. The only long-term answer for managing solid waste and to meet the demands and needs of our residents is the development of a public system.

WHEREFORE, your affiant respectfully requests that the plaintiff's motion for summary judgment be denied in its entirety.

/s/ Ronald N. Soltys
RONALD N. SOLTYS

Sworn to before me this
6th day of July, 1995.

/s/ Carole L. LaLonde
Notary Public

CAROLE L. LALONDE
Notary Public, State of New York
Herkimer County
My Commission Expires 7/31/96

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CIVIL JUDGMENT

UNITED HAULERS ASS'N, INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., and INGERSOLL PICKUP, INC.,

Plaintiff

vs. 5:95-CV-516 (NAM)

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA AND COUNTY OF HERKIMER,

Defendant

[X] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That the Report and Recommendation of Magistrate Judge Peebles has been adopted in its entirety. Defendants' Motion for Summary Judgment is granted and the Complaint is dismissed. Judgment is hereby entered in favor of the defendants and against the plaintiffs.

All of the above pursuant to the Order of the Honorable Judge Norman A. Mordue, dated the 24th day of March, 2005.

MARCH 24, 2005 **LAWRENCE K. BAERMAN**

DATE **CLERK OF THE COURT**

s/
JOANNE BLESKOSKI
DEPUTY CLERK